[redacted]

Plaintiff in Error,

against

John G. Wood, Collector, &c.
Defendant in Error.

No. [redacted]

[redacted]

Plaintiff in Error,

against

Thos. Durham Stevens,
Defendant in Error.

No. [redacted]

Brief for Plaintiffs in Error.

CHARLES E. PATTERSON,
Of Counsel.

CHARLES E. PATTERSON,
ALPHEUS T. BULKELEY,
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Supreme Court of the United States.

OCTOBER TERM, 1899.

GEORGE T. MURDOCK, as Executor of the last will and testament of Jane H. Sherman, deceased, *Plaintiff in Error,* *vs.* JOHN G. WARD, Collector of Internal Revenue for the Fourteenth District of the State of New York, *Defendant in Error.*	No. 458.
GEORGE D. SHERMAN, *Plaintiff in Error,* *vs.* THE UNITED STATES, *Defendant in Error.*	No. 459.

BRIEF FOR PLAINTIFFS IN ERROR.

Both the cases above entitled involve the question of the constitutionality of sections 29 and 30 of what is commonly known as the "War Revenue Law," which is an Act of Congress entitled "An Act to provide ways and means to meet war expenditures and for other purposes," approved June 13, 1898. The facts set forth in

the two cases are substantially the same. The two actions have been brought, and the two alleged causes of action are intended to be stated so as to present the questions involved in such different ways, that the Court must of necessity pass upon the plain question involved.

In the first of the two actions, Mr. Murdock, as executor of the will of Jane H. Sherman, having paid under protest the tax required by the provisions of the law referred to, and having appealed in statutory form to the Commissioner of Internal Revenue, who rejected his appeal, brought his action in the proper state Court against the Collector of Internal Revenue, to recover back the amount of the tax which had been paid. The government, defending its Collector, removed the case from the state Court to the Circuit Court of the United States, and interposed a demurrer to the complaint of the plaintiff, which demurrer was sustained by the Court, and by the Court judgment was ordered sustaining the demurrer, and dismissing the complaint with costs. Judgment was accordingly entered, and the plaintiff sued out his writ of error, and has brought the case to this Court.

His assignment of errors is as follows:

ASSIGNMENT OF ERRORS.

Now comes George T. Murdock, executor of the last will and testament of Jane H. Sherman, deceased, by his Counsel, and respectfully represents that he feels himself to be aggrieved by the proceedings and judgment of the Circuit Court of the United States for the

Southern District of New York, in the Second Judicial Circuit, in the above entitled cause, and assigns error thereto, as follows:

1.—The Court erred in sustaining the demurrer and dismissing the appeal of plaintiff herein.

2.—The Court erred in refusing to find as was claimed by the plaintiff in error, that the imposition of the tax described in the complaint against the plaintiff in error, because of his ownership as executor of the last will and testament of Jane H. Sherman, deceased, of the property mentioned in the complaint, was unconstitutional, unlawful and void.

3.—The said Court erred in not deciding that the imposition and collection of said tax deprived this deponent of his property, and the estate represented by him of its property, without due process of law.

4.—Such Circuit Court erred in refusing to find that the law imposing said tax is not uniform, and does not afford equal protection of the laws to persons throughout the United States.

5.—The said Circuit Court erred in refusing to find that the law imposing said tax denied and does deny to persons throughout the United States, and within its jurisdiction, the equal protection of the laws.

6.—The Court erred in refusing to find that the law under which said tax was imposed, denies to the plaintiff in error the equal protection of the laws.

7.—The Court erred in refusing to find that the tax so imposed is a direct tax, and is void because not apportioned among the states, in proportion to their popu-

lation, and in accordance with the provisions of the constitution of the United States.

8.—The said Court erred in refusing to find that if said tax is an impost, excise or duty, the law imposing the same is unconstitutional and void, because the tax levied is not uniform throughout the United States, as required by the constitution of the United States.

9.—The Court erred in refusing to find that it is not within the province of the constitutional powers of the United States to levy a tax upon a right of inheritance or disposition by will, provided for by the laws of the state of New York.

10.—The Court erred in refusing to find, that in so far as the estate of the deceased consisted of the government bonds of the United States mentioned in said complaint, the Congress had not right or authority to impose or assess any tax upon the same, and in refusing to find that the plaintiff in error was entitled to recover back from the defendant in error in this action the amount of the tax mentioned in his complaint, and which was assessed against the plaintiff in error, because of his ownership as executor as aforesaid, of such bonds of the government of the United States.

11.—The Court erred in not overruling the demurrer to the said complaint.

In the case of *Sherman* v. *The United States*, the petition alleges that the plaintiff is entitled to receive the income of a portion of the estate of Jane H. Sherman, deceased, under the provisions of her will, during the term of his natural life. Under instructions from the

Commissioner of Internal Revenue, the present value of his life estate was estimated as of the sum of $398,623, and the tax thereupon was assessed at the sum of $8,969.02. This sum was by the executor deducted from the income payable to the plaintiff, and paid over to the Collector of Internal Revenue. This tax has gone into the Treasury of the United States, and the claim of the plaintiff in error is, that it having been unlawfully taken from him, and the United States having received the fund with full knowledge of the source from which it came, is liable in an action as for money had and received, to judgment for the full amount.

The general principle which underlies a right of recovery in such a case was established by this Court in the case of *Duncan* v. *Jaudon,* 15 Wall. 165.

The authority to sue the United States in this action is found in the provisions of the Act of Congress commonly known as the "Tucker Act," and being Chapter 359 of the Second Session of the Fifty-ninth Congress, passed March 3, 1887 (1 Supp. R. S. 559.)

This action was commenced by petition filed in the office of the Clerk for the Northern District of the State of New York, being the district in which the petitioner resided, and by service upon the District Attorney and Attorney-General, in manner prescribed by the statute. The United States Attorney for the Northern District of New York, duly appeared for the defendant in error, and served a demurrer to the petition, in due form of law, setting up that the petition did not state facts sufficient to constitute a cause of action. Upon presentation of the issues to the Court, the demurrer was sustained.

and upon the order of the Court judgment was duly entered sustaining the demurrer, and dismissing the petition with costs.

Thereupon the petitioner sued out his writ of error, and has brought the case to this Court, where he makes the following

ASSIGNMENT OF ERRORS.

Now comes George D. Sherman, by his Counsel, and respectfully represents that he feels himself to be aggrieved by the proceedings and judgment of the Circuit Court of the United States for the Northern District of New York, in the Second Judicial District, in the above entitled cause, and assigns error thereto as follows:

1. The Court erred in sustaining the demurrer and dismissing the appeal of the plaintiff in error herein.

2. The Court erred in refusing to find, as was claimed by the plaintiff in error, that the imposition of the tax described in the complaint against the plaintiff in error, because of his ownership as executor of the last will and testament of Jane H. Sherman, deceased, of the property mentioned in the complaint, was unconstitutional, unlawful and void.

3. The Court erred in not deciding that the imposition and collection of said tax deprived this deponent of his property, and the estate represented by him of its property, without due process of law.

4. Such Circuit Court erred in refusing to find that the law imposing said tax is not uniform, and does not

afford equal protection of the laws to persons throughout the United States.

5. The said Circuit Court erred in refusing to find that the law imposing said tax denied and does deny to persons throughout the United States, and within its jurisdiction, the equal protection of the laws.

6. The Court erred in refusing to find that the law under which said tax was imposed, denies to the plaintiff in error the equal protection of the laws.

7. The Court erred in refusing to find that the tax so imposed is a direct tax, and is void because not apportioned among the States, in proportion to their population, and in accordance with the provisions of the constitution of the United States.

8. The said Court erred in refusing to find that if said tax is an impost, excise or duty, the law imposing the same is unconstitutional and void, because the tax levied is not uniform throughout the United States, as required by the constitution of the United States.

9. The Court erred in refusing to find that it is not within the province of the constitutional powers of the United States to levy a tax upon a right of inheritance or disposition by will, provided for by the laws of the state of New York.

10. The Court erred in refusing to find that in so far as the estate of the deceased consisted of the government bonds of the United States mentioned in said complaint, the Congress had not right or authority to impose or assess any tax upon the same, and in refusing to find that the plaintiff in error was entitled to recover

back from the defendant in error in this action, the amount of the tax mentioned in his petition, and which was assessed against the plaintiff in error, because of his ownership as executor as aforesaid of such bonds of the government of the United States.

11. The Court erred in refusing to find that it is not within the province of the constitutional powers of the United States, or of the Congress, to levy a tax upon a right of inheritance or disposition by will, provided for by the laws of the state of New York, or to create classes which may be lawfully regarded in the imposition of taxes, or to make distinction between classes by whom taxes must be paid, or upon whom taxes may be imposed, or to recognize for the purposes of taxation any classes that may have been created by the state of New York; or to require the payment of a larger or different amount of tax from or imposed upon a legacy or a legatee, because of the greater wealth of the donor of such legacy, than is required when the legacy is a gift of a testator of smaller means.

12. Because the said act is in other respects unconstitutional and void.

13. The Court erred in that it refused to find that because of the matters set forth in the petition, the plaintiff in error should have and recover of the United States the sum of $8,969.02, together with interest thereon, from the time of filing his petition, besides the costs of this proceeding.

It is believed that no question strictly technical will be brought to the attention of the Court upon the argu-

ment of these cases. The question which it is desired to have decided by the Court is as to the constitutionality of the clauses above referred to of the War Revenue Tax Law.

The position taken by the plaintiffs in error is:

First. That the tax sought to be imposed is a direct tax, and therefore void, because not apportioned in accordance with the provisions of the constitution.

Second. If the tax in question be not void, because a direct tax and not properly apportioned, it must be classified as a duty, impost or excise, and void, because not uniform, as required by the provisions of the constitution.

Third. It is beyond the power of Congress to create laws of inheritance, or to impose a tax upon a right of inheritance created by the statutes of different states.

Fourth. It is beyond the province of Congress to make a distinction of classes in the imposition of taxes, duties, imposts or excises, and in like manner it is beyond its power to make discrimination amongst classes that may have been created by the different states.

Fifth. In so far as the estate of Mrs. Sherman consisted of government bonds, Congress had not power or authority to impose a tax either upon the *corpus* of the estate, or the income derived therefrom, or upon a transfer or inheritance thereof, or right of succession thereto.

ARGUMENT.

It would be exceedingly presumptuous in any person, however learned, to undertake to place a construction upon the provisions of the constitution, which would ignore the decisions of this Court which have from time to time been handed down, giving meaning and construction to the different clauses of the constitution of the United States, pertinent to the subject of taxation. Nevertheless, if all that has been said by the Courts could for the present be disregarded, and an argument made with reference to the true construction of the provisions of the constitution, aided only by previous and contemporary history, by judicial decisions in other cases explaining the use of language, and by considerations of the use of language as interpreted by the dictionaries, lexicons and decisions of courts, and by common use, without assistance from interpretations given by participants in the conventions which framed the different articles which make our constitution, it is barely possible that a very different construction would be placed upon the different clauses relating to taxation, than now seems to obtain.

When the different colonies, which afterwards became the United States, first federated together, there was necessarily a question about some provision for the expenses of carrying out the objects of the general confederation. The same meaning is implied by the words in common use, "expenses of government."

Under the confederation, in 1778, the expenses of

common defense and general welfare were provided for by article 8 of "the articles of confederation and perpetual union" between the different states. This reads as follows:

"Art. 8. All charges of war, and all other expenses that shall be incurred for the common defense or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several states in proportion to the value of all land within each state granted to or surveyed for any person, as such land and the buildings and improvements thereon shall be estimated, according to such mode as the United States in Congress assembled shall from time to time direct and appoint.

"The taxes for paying that proportion shall be laid and levied by the authority and direction of the Legislatures of the several states, within the time agreed upon by the United States in Congress assembled."

If the loyalty of citizens had been universal and had equalled that of their representatives, this clause might have been, and probably would have been, all sufficient. It occurred, however, in actual practice, that there was extreme difficulty in collecting a fund sufficient to provide for the expenses of the confederation, under the article that has been quoted above. Therefore, it occurred in 1785 that so much of the eighth of the "articles of confederation and perpetual union between the thirteen states of America" as is contained in la the language quoted above, was changed so as to read as follows:

"That all charges of war, and all other expenses that have been or shall be incurred for the common defense or general welfare, and allowed by the United States in Congress assembled, except so far as shall be otherwise provided for, shall be defrayed out of a common treasury, which shall be supplied by the several States in proportion to the whole number of white and other free citizens and inhabitants of every age, sex and condition, including those bound to servitude for a term of years, and three-fifths of all other persons not comprehended in the foregoing description, except Indians, not paying taxes in each state."

Our general knowledge of the history of the times instructs us, and it is apparent from the reading of the provisions of the articles of confederation above quoted, that there was no completed and detailed method of general taxation which was a subject of consideration by the confederated states and brought in their convention to a final determination and put into form as a consummated plan.

There was, of course, the question of a revenue to be provided for expenses that might be imposed upon the confederated states; and it was apparently the idea of the delegates to the convention which adopted the articles of confederation, that such expenses as must necessarily be incurred to provide for "the common defense and general welfare" should be paid by the different colonies or states upon some basis which would require the payment to be so made that its burden would bear *equally* upon the citizens of all of the states. At the time these delegates from the different states met in

convention, that is in 1778, the main foundation of wealth was land. There was commerce, and there were manufactures, but apparently, and thus our reading from history instructs us, the main reliance of the people of the confederated states was upon the land which was occupied by individuals. Industrial pursuits were mainly agricultural.

The statistics of the census of the United States, as published in the latest record, show that at the time of the adoption of these articles of confederation, but a fraction above three per cent. of the population of what are now the United States, was urban. More than ninety-six per cent of the residents of this country lived upon agricultural lands or in small villages. Therefore, it is not strange that, when there was question of intercolonial taxation,—for the purposes of equalization,—resort was had to rules and limitations based upon an apportionment of land holdings.

For some reason or other, the plan which was adopted in 1778 did not prove satisfactory. In some of the reports it is said that there was difficulty about collecting taxes upon the plan provided for in these articles of confederation. At all events, whatever may have been the defect in the system that was provided for in 1778, and whatever difficulties may have arisen from attempts to make collections under the agreement of the confederated states, as embodied in the articles of confederation of 1778, it was deemed advisable to provide that the revenue of the confederated government should be derived from an assessment imposed in some different way from

that which was provided for by the articles of confederation of 1778.

As a result, the above quoted provision of the amendment of 1785 was enacted. This made provision that the assessment of taxation thereunder should be in proportion to population, instead of in proportion to the valuation of landed property.

To make a brief review up to this time, we have this situation:

Thirteen colonies or states confederated together in rebellion or revolution. Each one of the states or colonies claimed to be independent,—unless dependence upon Great Britain could be enforced—and the object of the confederation was, to throw off all allegiance to the mother country.

It became necessary to provide a common fund for the common defense, and for the general welfare of all the states or colonies thus confederated.

It was agreed that there was a necessity for such a common fund. The question of how provision should be made to supply the common treasury was a question of political economy, which required the exercise of utmost ingenuity.

At first, it was deemed just, expedient and wise, that the common treasury, from which should be furnished funds for the charges of war and other expenses incurred for the common defense and general welfare, should be supplied and filled up by the several states by payments in proportion to the value of all land within each state.

At the present time, if there be considered the agricultural pursuits of the people of that day, no one can say that the provision ought to have been rejected as unwise. Nevertheless the result was that the plan proposed did not work well.

A few years later it became the fundamental law of the confederation, that all charges of war, and all other expenses incurred for the common defense or general welfare, should be defrayed out of the common treasury, to be supplied by the several states in proportion to their population.

When the method of determining the population became a subject of consideration, it was further provided that every free white man, woman and child should count one, and each slave count three-fifths of one, and Indians, not paying taxes, should count nothing.

It is at present difficult to determine whether the later method of taxation proved more satisfactory than the one which had preceded it, and which was based upon a valuation of real estate. It is sufficient, for the purposes of the questions now under consideration, to know that the later method of assessment and taxation was the one which became embodied in the constitution of the United States, when the articles of confederation gave way to the new constitution.

When it became necessary, for other reasons, as well as for matters of taxation, that there should be a more perfect union between the states, and different provisions were required to be instituted for the common welfare, the constitution of the United States was framed.

This was, as matter of course, made with reference to the then existing situation of affairs, with such enlightenment as was held by the representatives of the people in the convention which framed that constitution, obtained by them from their knowledge of the existing state of affairs, not only at home, but in the whole world, and from their observation of the effect of such articles of confederation. From their solid judgment, based upon their knowledge of present and past, and their hopes for the future, the delegates framed the constitution.

It then was, as it now is, apparent that there was a necessity to provide for a treasury, from which the expenses incidental to the general government could be paid. As has been truly and well said by Mr. Chief Justice Fuller, in *Pollock* v. *Farmers Loan & Trust Company* (157 U.S.429), at page 561, there was a great change in the condition of things when the articles of confederation were superseded by the constitution. The constitution "gave the power to tax, both directly and "indirectly, to the national government, and, subject to "the one prohibition of any tax upon exports and to the "conditions of uniformity in respect to indirect and of "proportion in respect to direct taxes, the power was "given without express reservation. On the other hand, "no power to tax exports, or imports except for a single "purpose and to an insignificant extent, or to lay any "duty on tonnage, was permitted to the States."

Nothing can be clearer than the language used by the Chief Justice, in referring to the distinction made by the constitution, between direct and indirect taxes. At

the same time, the question still remained as to what are direct taxes, and what are indirect taxes. Mr. Justice Paterson, in *Hylton* v. *The United States,* 3 Dallas, 171-177, uses this language:

"I never entertained a doubt that the principal, I will "not say only, objects that the framers of the constitu- "tion contemplated as falling within the rule of appor- "tionment, were a capitation tax, and a tax on land."

It is altogether probable, that in framing the constitution, the delegates to the convention had largely in mind the experience of the colonies, in the matter of the collection of taxes under the articles of confederation.

There had been tried two methods for raising money from the colonies, to replenish the public treasury. One of these had been by a land tax, levying an assessment upon the different colonies or states, and making the apportionment according to the value of lands within the different states.

The other plan, and which was adopted as an improvement upon the former, and which superseded the former, was by a capitation, or by tax upon the different states, which should be apportioned according to the population of the different states. When the question of population was considered there came in the factor of slaves, and the status of slaves was recognized to the extent of counting each slave as three-fifths of a person. Indians not taxed counted nothing.

It was undoubtedly intended by the constitution, to provide that the states under that constitution, should

have absolute and unlimited power of taxation, except only as provided by the constitution itself.

There are three separate provisions of the constitution, bearing upon the subject of taxation. The first is clause 3 of section 2 of article 1, which provides that direct taxes shall be apportioned among the several states included within the Union, according to their respective numbers.

> As an incidental commentary upon the inaccuracy of the use of language, as used in the Constitution, it is not uninteresting to call attention to the use of the words "according to their respective numbers." These words can, grammatically, refer only to the States, and not to the population of the States, although a rule is given for determining the respective numbers, by the clause immediately following, which provides that they shall be determined by adding to the whole number of free persons, excluding Indians, three-fifths of all other persons.

It seems almost certain that this clause of the constitution was enacted with special reference to the state of affairs that pre-existed under the articles of confederation. It did not undertake to define what direct taxes were, but it manifestly referred to such taxes as the confederated states had been accustomed and authorized to levy and collect, and provided for the apportionment of such taxes among the different states. There was not here any authority for the collection of any taxes whatever, but a provision as to the manner in which taxes, when *directly* imposed upon the states, or the people of the states, should be apportioned.

The next provision with reference to taxation is clause 1 of section 8 of the same article 1. This defines the taxing power, and names the branch of government by which the power is to be exercised. The provision is

that Congress shall have power: *"To lay and collect "taxes, duties, imposts and excises, to pay the debts and "provide for the common defense and general welfare of "the United States; but all duties, imposts and excises "shall be uniform throughout the United States."*

The first sentence of this provision gives to the congress absolute and unlimited power of taxation, to the extent that revenue may be required "to pay debts," etc.

> [NOTE.—There is no place here for a discussion about punctuation, or whether the pause after "excises" should be a comma or semi-colon, or whether the power to "lay and collect taxes, duties, imposts and excises" is limited by the following clauses to such as may be necessary to pay the debts and provide for the common defense and general welfare of the United States.]

Use is made of the words "taxes, duties, imposts and excises." The second sentence of the same section makes no reference to the use in the preceding sentence of the word "taxes." In it is provided that "all duties, imposts and excises shall be uniform throughout the United States." Evidently the word "taxes" was omitted from this clause, because it had reference to the direct taxes which had been mentioned under clause 2 of section 2, and for the apportionment of which a rule had been there provided.

The third clause with reference to taxation, is the fourth clause of section 9 of the same article 1, which is as follows: "No capitation or other direct tax shall be "laid, unless in proportion to the census or enumeration "hereinbefore directed to be taken."

This last clause was not intended to confer any power whatever, or to establish any rule by which the levying

or collecting of taxes should be governed, except that it provided that for the purpose of ascertaining the population of different states by which the apportionment of direct taxes should be governed, resort should be had solely and only to the census which the constitution provided should be taken within three years after its adoption, and thereafter once in every ten years. This clause may be paraphrased by saying "the census or "enumeration hereinbefore directed to be taken, shall "be the sole rule for determining population, for the pur- "pose of the imposition of capitation or other direct "tax."

Clause 5 of this same section 9 is merely a prohibition upon the powers of Congress with reference to taxation in that it says that "no tax or duty shall be laid on arti- "cles exported from any State."

Although this Court has spent much time and erudition in its endeavors to interpret the clauses of the constitution above referred to, and especially in endeavoring to ascertain what was in the minds of the delegates to the convention which framed the constitution, when enacting the clauses above referred to, it would seem as if it ought to be conceded that the convention was not altogether accurate in its use of language, and the members of the convention had not the clearest ideas of the distinctions that might have been made between the different classes of taxes for the collection of which they were making provision. It is probable that the use of the word "taxes" was intended to be applicable to those direct taxes which had been or theretofore could have been imposed under the articles of confederation.

It was intended that there should be a new and practically unlimited power of taxation, sufficient to cover every form of taxation not previously provided for. In its generic sense, no word could be used synonymous with anything applicable to taxation, more inclusive, than the word "impost." It means any tax that is imposed upon any person or thing. The word "duty" is almost equally as broad, while the word "excise" naturally has a more limited signification. In common use, in legislative use, and technically, these words have a somewhat restricted meaning, which this Court and general usage define by contradistinction to direct taxes, but at the same time, by a somewhat confused and bewildering definition, as "indirect."

Whatever legal and constitutional distinction there may be between direct and capitation taxes upon the one hand, and indirect taxes, or imposts, duties and excises upon the other, there is one underlying principle which is the basis of each and all methods of taxation. That principle is that the taxes shall be so apportioned as to do justice *equally* between parties that are subject to the payment of the tax. Under the articles of confederation, an attempt had been made to collect revenue for the government, by imposing a tax upon lands. This was abandoned either because, as has been suggested in some cases, there was difficulty in collecting the taxes, or because it was supposed to work inequality, and justice required a more equitable method of apportionment. Whatever the reason, the change took place, and the new system, which was introduced in 1785, was the plan

which commended itself to the people at large at the time of the adoption of the constitution.

Already, at that time, discriminating legislation was being sought, because of questions that arose from the holding of slaves. In many states, the slave population constituted a very large proportion of the whole population, while in other states an effort was being made slowly and gradually to abolish slavery, and in one state at least, this object had been accomplished. A question of apportionment, whether of representatives or of taxation, upon a basis of population, necessarily had to take into consideration the slaves held in each state, unless the slave-holding power would consent to property in slaves being regarded merely as property in merchandise. This, of course, could not be expected, while slave-holding states desired to have representation based upon a population, and were prepared to advance plausible arguments to demonstrate that slaves were human beings, constituting a part of the population.

Immediately, however, upon such a contention being made, the counter proposition, not unnaturally, was presented, that if the slaves were to be regarded as constituting an element of population, they must be counted for purposes of taxation. The compromise resulted that both for purposes of representation and taxation, each slave should be counted three-fifths of a unit. Thus the question of direct taxation was considered as settled upon a basis of equality.

The same attempt to reach equality was made, when it was provided that the general government should have power to collect duties, imposts and excises. So far as

direct taxation goes, equality had been provided for by a provision which either represented the views of the members of the convention framing the constitution, as securing equality, or was a compromise measure, accepted, as representing equality.

Dealing with the question of indirect taxation, as expressed by the words, "duties, imposts and excises," apparently was not regarded as a difficult matter. It was only necessary to make a general declaration that there should be an equality in the imposition of these indirect taxes. That equality, apparently, could be secured by a declaration that the taxes so imposed should be uniform. At all events, it seems to have so occurred to the members of the convention framing the constitution.

The clause with reference to indirect taxes, requiring that they should be uniform, undoubtedly would have been satisfactory to the members of the convention, if applied to the question of direct taxes, there had not been the danger of misconstruction or difficulty of application, when direct taxes alone should be involved.

To illustrate, supposing the constitution had provided, that direct taxes shall be equal and uniform throughout the United States, or in all the states, it is not difficult to imagine what a broad field for litigation would have been left open, before it could be determined what direct taxes were uniform. The question that has been above adverted to of slave population, would have been a more fruitful ground for discussion than it already has been in the history of this country. The question of uniformity would have involved the question of valuation of real and personal

property, as well as the question of population, and, indeed, it would seem as if human ingenuity, developed and trained by education in law schools, and experience in practice at the bar, would have found an inexhaustible field of industry, in determining the meaning of such a clause, if it had been so used.

At the same time, the application of the words to such indirect taxes as were within the contemplation of the framers of the constitution appears to be exceedingly simple. To illustrate how simple, it may be sufficient merely to call attention to an incident which this Court recognized as matter of history in giving its decision in the Pollock case. It appears that when the draft of clause 1 of section 8 of article 1 of the constitution was about to be finally adopted, it was referred to the committee on style. As originally prepared it read, that all duties, imposts and excises should be "equal and uniform" throughout the United States. The committee on style struck out the word "equal" as mere tautology, and so reported. It was the position of the committee, and that adopted by the convention, that if the indirect taxes were made uniform, of necessity they must be equal.

This has been thus referred to, to direct the attention of the Court specifically to what must be perfectly familiar to every member of the Court, and that is, that the one fundamental idea underlying the constitutional restrictions upon legislation that should impose taxation was, that there should be *uniformity* or *equality* in all taxation. Such equality was to be secured by making the tax imposed uniform. In principle, there was

no difference between direct and indirect taxes—in application of methods there was a divergency.

For the purposes of the present case, it seems to be of comparatively little moment, whether the tax in question be regarded as a direct tax or capitation, or whether it is to be classified as a duty, impost or excise. If a direct tax, it certainly is unconstitutional, because not apportioned among the several states according to their respective numbers. If a duty, impost or excise, it is not uniform.

DIRECT TAXATION.

While contending that in either event the tax is unconstitutional, it is difficult to understand how, in view of the decisions of this Court, it can be construed as any other than a direct tax. For the purpose of a judicial construction of the present act, it does not seem to be necessary to go back of the decision of this Court in the Pollock case.

In *Pollock* v. *Farmers Loan & Trust Company* (157 U. S. 429, 558), the learned Chief Justice says this:

"Ordinarily all taxes paid primarily by persons who "can shift the burden upon some one else, or who are "under no legal compulsion to pay them, are considered "indirect taxes; but a tax upon property holders in re- "spect of their estates, whether real or personal, or of "the income yielded by such estates, and the payment of "which cannot be avoided, are direct taxes."

In presenting a brief to this Court upon the questions

involved, it is, of course, unnecessary for counsel to repeat to the Court word for word its decision in a case so recent as the income tax case. At the same time, the words that have just been quoted find so pertinent an application to the language of the statute under consideration, that it seems exceedingly strange that some of the distinguished lawyers in the Senate or House of Representatives should not have marked the incongruity of attempting to enact a statute so clearly prohibited by the constitution, and so recently interpreted by this Court.

Nothing can be plainer than the language of Mr. Chief Justice Fuller (and it is as indisputable as it is plain):

"BUT A TAX UPON PROPERTY HOLDERS IN RESPECT OF "THEIR ESTATES, WHETHER REAL OR PERSONAL, OR OF "THE INCOME YIELDED BY SUCH ESTATES, AND THE PAY- "MENT OF WHICH CANNOT BE AVOIDED, ARE DIRECT "TAXES."

Other counsel, opposed to the government upon this question, have so fully and exhaustively examined the cases which have been decided in this Court upon the question of direct taxation, that it would be in the line of plagiarism to repeat their arguments in new language, and no aid would be afforded to the Court, by repeating what has been so well said by them, or by again citing authorities referred to by them. For the purposes of the present argument, it is considered that the question of what constitutes a direct tax was fully decided by this Court in the Pollock case, in so far as any questions

now before the Court may be the subject of decision. The citation of other cases seems almost like expressing a doubt as to the integrity of that decision.

Even with this disclaimer, it is not impertinent to consider the language of Mr. Justice Paterson in the Hylton case (3 Dal. 176):

"What are direct taxes within the meaning of the "constitution? The constitution declares that a capi- "tation tax is a direct tax; and both in theory and prac- "tice, a tax on land is deemed to be a direct tax."

In the Act of 1898, Congress apparently sought to avoid the imposition of the present tax, as a direct tax, by not including real estate within its provisions. It went, however, to the other extreme of making it a capitation tax, for the tax is not imposed upon any subjects of duty, impost or excises, but is made directly against individuals or certain classes of individuals.

The situation is not relieved at all by provisions which enable the persons declared subject to the tax to recoup from the funds in their hands. There are few taxes, except those that are paid by the final consumer of an article, which cannot in some way be passed on to another. A tax upon real estate that is held for the purposes of a tenement, will be added to the rent exacted by the landlord, and so paid by the tenant. So with most other taxes.

In this case, the tax is imposed upon a trustee, and he is instructed that he may recover the tax from the trust estate. *The tax is a direct tax imposed upon him.* If this be not so,—if the fact that he may make legatees pay the tax, relieves the situation from the imputation

that it is a direct tax imposed upon the executor, the beneficiary whose legacy is made the subject of the tax, is taxed in his individual person, because of something which he has or receives. The tax is upon him. That such is the fact cannot be varied by any claim or pretence that the tax is upon his right of inheritance. His right of inheritance is but an item of property like other properties that he may own.

Nearly all taxes that are imposed upon individuals are imposed upon them with reference to the property that is possessed by them. Right of inheritance is an item of property, and property that comes by inheritance is not different from other property of the same species. A poll tax of one dollar per head imposed upon the privilege of voting, or upon immunity from service in the militia, is capitation, which is uniform, and probably was under consideration by the convention which framed the constitution. A tax imposed upon individuals in proportion to their wealth, is strictly a capitation, although it is liable to be regarded as a tax upon property.

There seems to have been always a distinction between the taxation of personal and real property, which rests to some extent upon a fiction of law with reference to the *situs* of the property. Real estate is in many or perhaps most states taxed as such, one reason for which is, that it is immovable. A tax is not imposed upon personal property, but is imposed upon the holder of personal property, because the possession of that personal property is presumed to accom-

pany its holder wherever he may be. The tax upon land is upon all sides conceded to be a direct tax. The tax upon an individual for his right to vote, or his right to citizenship, ordinarily called a capitation or poll tax, is unquestionably a direct tax. Is the tax any less direct which is imposed upon an individual because of his holding or owning property, whether real or personal? In the Hylton case, it was held that a tax on carriages was not a direct tax. Would the same be held, if the law had read, "Every person who owns a carriage shall be "subject to a tax?" If so, then it must be held that a tax upon individuals is not a direct tax.

A tax upon individuals would be conceded to be a direct tax if all individuals were assessed equally. A tax does not become direct or indirect merely because it is equal or unequal. It must be direct if directly imposed upon a person.

This law, now being considered, says (Section 29), that "any person or persons having in charge or trust, as "administrators, executors or trustees, any legacies or "distributive shares arising from personal property " * * * shall be, and hereby are, made subject to "a duty or tax, to be paid to the United States as fol- "lows, that is to say:"

It seems utterly impossible to conceive of language which could be more explicitly used, for the imposition of a direct tax, than is found in these words. The tax is imposed directly upon administrators, executors or trustees, or rather, to be more accurate, it is imposed *upon such persons as are administrators, executors or trustees.* As Mr. Chief Justice Fuller says in the

words above quoted, the tax is imposed upon them *"in respect of their estates,"* and the tax is one *"the payment of which cannot be avoided."* Therefore it is a direct tax.

This reasoning cannot be avoided by saying that the person upon whom the tax is thus directly imposed occupies a representative position, and the tax is imposed upon him merely in his representative capacity, nor by saying that the tax is not upon him, but upon the property which he has in his possession, and holds in trust. It makes no difference in determining the question whether the tax is indirect or direct, whether the property is in trust, or owned absolutely by the party assessed. The tax is imposed upon the individual himself. Mr. Murdock is the party who is "made subject to a duty or tax."

There are other provisions that concern the method in which the tax shall be collected, but none of them modify or change in any way, shape or manner, the fact that the person who is executor is made subject to the duty or tax. Section 30 undoubtedly provides that the tax or duty "shall be a lien and charge upon the prop-"erty of every person who may die as aforesaid, for "twenty years, or until the same shall, within that "period, be fully paid and discharged by the United "States." It also undoubtedly speaks of: "The duty "or tax assessed upon such legacy or distributive share." It also provides that proceedings may be had for the collection of the tax, from the estate of a decedent who may be represented by the executor. At the same time, the law provides for direct proceedings against the party

assessed, if he have custody or possession of the property of the decedent, and makes him personally liable to penalties, in case he refuses to give all such information as shall be necessary to enable the government to determine the amount of the tax imposed. Whatever the other provisions of the statute may be, they do not in any way modify or change the effect of the opening sentence of section 29, which says in so many words that the person having in charge as executor, any legacy or distributive share arising from personal property, shall be subject to a duty or tax to be paid to the United States. It is the individual, it is the person, that is made subject to the tax, and no language could be used which under any construction would more effectually create a direct tax, than the words which are used in this section.

INDIRECT TAXATION.

Supposing, however, that the court should be of opinion that this tax is not a direct tax, and that it comes under the head of duty, impost or excise, the argument against its constitutionality is none the less strong, for if duty, impost or excise, there is a constitutional requirement that such taxes shall be uniform throughout the United States.

The language of the constitution is "but all duties, "imposts and excises shall be uniform throughout the "United States."

The question of lack of uniformity seems to be so one-sided, that the incongruous provisions of the statute must require a decision against its validity, unless it shall be saved by some construction that may be put upon the words "throughout the United States."

Where the question has not been directly involved, and when careless reference has been made to this use of language, it may appear to have been considered in some of the cases in this Court that this requirement of the constitution is fully met, if a statute imposing a duty, impost or excise operates *territorially* in a uniform manner. By others it has been left open to the doubt expressed by Mr. Justice Peckham in *Nichol* v. *Ames* (173 U. S. 509, 521), "whether the word 'uni-"form' is to be understood in what has been termed its " 'geographical' sense."

Careful consideration of the question, however, must lead to the conclusion that the word "uniform" is not restricted to a geographical definition. Let it be supposed that the words "throughout the United States" had been stricken out, by the committee on style, and the recommendation of that committee had been adopted by the convention. It is hardly conceivable that this Court would have held, that the meaning of the clause now under consideration would have been either enlarged or restricted by the omission of these words. As they now remain, we have as much right to regard them as superfluous, as the committee on style had to regard the word "equal" as tautological with "uniform." Leaving out the words could not give the government of the United States jurisdiction of questions of taxation, be-

yond the limits of its own territory. Making use of the words, as they have been written, does not restrict the territorial limits within which the constitution has application. Neither can any rational use of language lead to the construction that the words "throughout the United States" were intended to be or are at all synonymous with the words "territorial," or "geographical."

The cases in which this question has been largely discussed have arisen mainly upon matters of customs, where, for instance, it was contended that the law which could only be imposed upon a seacoast was prohibited by this language of the constitution, because it could have no application whatever to an inland state. Other instances are cases where the law would apply to the products of a state, which, because of variation of climate, could not be grown in other states.

No decision based upon such contentions as these can have application to such a question as is here presented. It cannot be disputed that the law here in question applies with the same force and effect in Maine as in California. Territorially, it is uniform. But it is absurd to contend that the provisions of the constitution can be fully met and complied with by imposing a tax that shall be territorially uniform, but unequal in every other respect. For instance, suppose the law which is at present under consideration, had said that every person having in charge as executor any personal property, shall be subject to a tax in following form, that is to say: if his name commences with A he shall be subject to a tax of one per cent.; if his name commences with B he shall be subject to a tax of two per cent.; if his name

commences with C he shall be subject to a tax of three per cent.; and so on through half the alphabet; and then, let there follow a provision that if his name commences with any other letter of the alphabet, he shall not be subject to any tax at all.

It cannot be possible that such a statute would be upheld as constitutional. If held to be unconstitutional, it would be because of its violation of the provision at present under consideration, or of some other provisions which are equally applicable to the present law, or because of its being so unequal as to be subversive of the basic principles of the establishment of the government itself.

Whatever reason might be assigned for withholding the support of the constitution to such a law, it could not be met and overcome by the argument that this provision of the constitution requires only territorial uniformity, and is not violated, provided the law is the same in all the states and territories.

Assuming that it be established that the question of uniformity is not a mere question of territorial uniformity, it *may be* incumbent upon the assailants of the validity of this law to demonstrate that it is not uniform.

This ought not to be difficult. At the same time, it is something that can hardly be established by arguments based solely upon precedent in this Court, for there can be few precedents to aid in the construction of a statute which is so absolutely unprecedented as is the present law. There have been laws of Congress, and laws of different states, which have imposed a different ratio of taxes

upon different estates, because of their greater or less valuations. It is unnecessary to consider now the validity of any such laws. It is believed that this is the first law that was ever enacted, of this or of any other country, which made the amount of a tax to an individual dependent upon the wealth of the donor of a legacy. It is equally certain that this must be the first law which has ever been enacted by a civilized nation, which made the ratio of taxation upon the estate of a decedent to depend upon the value of the assets which he held in his possession at the time of his death, irrespective of the debts which he might owe, and of the claims of creditors to take his estate from him.

Unfortunately, it is not the first statute that has ever imposed prohibitive duties upon a man's attempts to make charitable distribution of his estate. It is none the less to be condemned because of precedents that are for like reasons more or less obnoxious.

The Court will note that this tax is imposed, not with reference to the clear value of the estate held in trust after payment of debts, but the executor is made subject to a duty or tax, where the amount of personal property passing into his charge exceeds $10,000, the duties varying thereafter, according to the amount of the estate which passes into his hands, not according to the amount of legacy or distributive share which passes to a legatee, beneficiary or next of kin. Thus, if the estate be between $10,000 and $25,000, the tax is at the rate of seventy-five cents on each one hundred dollars, when the beneficial interest passes to lineal issue, or lineal ancestor, brother or sister of the person who

died possessed of such property. If the party entitled to such beneficial interest is related in more remote degree, the executor has to pay a greater tax, until, if it pass to a remote relative, or to a stranger in blood, or to a body politic or corporate, the executor shall pay at the rate of $5 for each $100 of clear value of the interest given. If the estate exceeds $25,000, but does not exceed $100,000, the rates of duty or tax shall be more by one and one-half, and where the amount of value of the exceed the sum of $500,000, the rates of duty shall be more by two, and where the amount of value of the property shall exceed the sum of $500,000, but not $1,000,000, such rates shall be more by two and one-half, and where the amount and value of said property shall exceed the sum of one million dollars, such rates or duty shall be more by three.

That the construction that is put by counsel upon the language of this act, in saying that the tax depends upon the amount of property that passes into the hands of the executor or trustee, regardless of the claims of creditors upon that property, is correct, appears from the language of the act itself, and is in harmony with the ruling of the Treasury Department. The Treasury Department Ruling, No. 20,461, on the subject of legacy taxes, is as follows:

"(20,461.)

"LEGACY TAXES.

"Washington, D. C., December 23, 1898.

"Sir—This office is in receipt of a letter from Smith & Weatherly, attorneys in your city, under date of October 24 (who have to-day been referred to you), asking

certain questions relative to legacy tax. In reply, you will please inform them as follows:

"The whole amount of personal property, before deducting debts, expenses, or shares to widow or husband, determines the rate of taxation. The tax on legacies should be deducted from the individual legacies, but is a lien upon the entire property of the decedent. The only legacies or distributive shares exempt are those passing to the widow or husband.

"If an estate valued at $188,000 had $100,000 debts charged against it, thus reducing the amount subject to distribution to less than $100,000, the tax on the legacies must be paid as of an estate exceeding $100,000 in value and not exceeding $500,000."

To make illustration of the workings of this law, it is not necessary to go outside of the cases that are before the Court, and such hypothetical cases as may be suggested by the very language of the statute itself.

Supposing Mrs. Sherman had died, leaving not to exceed $10,000, the government would have none of it, whether it went to her children, to her creditors, or to the different charities she undertook to provide for. If she had left $11,000 of principal and a thousand dollars of debts, a tax would have been imposed which, while a direct tax upon the executor, would ultimately have been indirectly a tax upon each of the beneficiaries of Mrs. Sherman, although they did not receive one cent more from her estate than they would have received if she had taken the pains to pay the thousand dollars of debts in her lifetime, instead of leaving those debts to her executors to pay. If she had left exceeding ten thousand dollars, and not exceeding twenty-five thousand dollars,

those who were her beneficiaries would have been subject to a tax proportioned to the amount of her wealth, and not solely based upon the amount of the legacies.

The fact is, her estate exceeded one million dollars, and became subject to the highest rate of duties. Consider the case of the Sherman Collegiate Institute, or of the Saratoga Hospital. Mrs. Sherman, during her lifetime, had cared for these institutions. She undertook, by her will, to give to the Collegiate Institute $20,000, and to the Hospital $5,000. Had her whole estate not exceeded $25,000, she might have accomplished this end, without imposing upon these charitable institutions a greater tax in favor of the government than five per cent., but, unfortunately for them, she was worth more than a million of dollars, so the government takes fifteen per cent. in each case, and her twenty thousand dollar bequest to the Collegiate Institute is immediately reduced by the government to $17,000, and her bequest of $5,000 to the Saratoga Hospital cannot be paid until there has been deducted from it $750.

The power of the government to impose taxes upon these legacies in some form or other is not now the subject of question. It is, however, confidently asserted that the tax is not uniform, which says that the Sherman Collegiate Institute cannot take a legacy of $20,000 from a party that is worth upwards of a million dollars, unless it pays three thousand dollars, while it may take such a legacy from a party that is worth more than $100,000, but not to exceed $500,000, upon payment of ten per cent. or two thousand dollars, and may take its whole twenty thousand dollars from a party that is worth less

than $25,000, upon payment of a tax of one thousand dollars, and may accept without payment of one cent of duty, the whole of a person's estate, provided that estate does not exceed $10,000.

The lack of uniformity and equality could not be made more apparent in any supposable case. The imposition of the tax is based upon most irrational, inequitable and unjustifiable principles; upon the creation of classes, not recognized by law; upon absolute inequality, and upon the clearest lack of uniformity. Why a hospital may not receive a gift from a millionaire without paying a tax of fifteen per cent, when it could be the recipient of an equal amount of money from a poor man without paying anything, passes all comprehension.

Nevertheless it comes within the provisions of this law which makes a distinction that is outside of the pale of the constitution.

CREATION OF CLASSES.

This tax is unconstitutional and void, because it assumes to create or recognize classes which Congress has no power to create or recognize.

The division of sovereignty between the United States and the separate states is not visionary, but real and marked. Articles IX and X of the constitution, which were added by way of amendment to the work that was done by the original convention, accurately de-

fined what undoubtedly would have been implied had those clauses not been formulated.

The United States represented a government of delegated powers. In the constitution, while there was an enumeration of certain functions bestowed upon the general government, and of certain rights reserved to the people and to the different states, it was nevertheless the understanding that the general government had no rights or powers whatever except such as were expressly delegated to it. Articles IX and X did nothing but make more explicit what had been previously understood.

Article IX is: "The enumeration, in the constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Article X reads: "The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states, or to the people."

The right of taxation given to the United States was just as broad as the language of the constitution in which it was given, and no broader. Unlimited right of taxation was reserved to the states, except as restrictions were placed upon that right by the words of the constitution. The right to regulate the descent of property by inheritance was not given to the United States. It was left to each of the states to regulate the question of inheritance, as each state might for itself determine. The right of legislation by each state is not a property right which is the subject of taxation, either direct or indirect. The imposition of a tax upon the right of inheritance, is a limitation upon the power of the state to

create, recognize, or control the right of inheritance. As such a limitation, it is as much subject of criticism as is the attempt by the United States to impose an income tax upon the salaries of state judicial officers.

In *United States* v. *Perkins* (163 U. S. 625), this Court had under consideration the inheritance tax laws of the state of New York. The Court upheld the power of the state of New York to impose an inheritance tax, and in its decision held that the particular tax under consideration was not a tax upon the property itself, but upon its transmission by will or by descent. In this, however, it but followed the decisions of the state Court, in construing a statute of the state. The opinion of the Court, per Mr. Justice Brown, quoted from the language used by Mr. Chief Justice Taney, in *Gager* v. *Grima* (8 How. 490, 493), as follows:

"The law in question is nothing more than an exer-
"cise of the power which every state and sovereignty
"possesses, of regulating the manner and terms within
"which property, real and personal, within its dominion
"may be transferred by last will and testament, or by
"inheritance; and of prescribing who shall and who
"shall not be capable of taking it. * * * If a state
"may deny the privilege altogether, it follows that when
"it grants it, it may annex to the grant any conditions
"which it supposes to be required by its interests or
"policy."

This recognizes one of the reserved powers of the states, but its very recognition amounts to substantially a denial of the possession of a like power upon the part of the United States.

The Perkins case also decides another point here con-

tended for, namely, that the inheritance tax here complained of, is a limitation upon the power of a testator to bequeath his property. The language of the Court is (p. 628):

"The so-called inheritance tax of the state of New "York is in reality a limitation upon the power of a tes- "tator to bequeath his property to whom he pleases; a "declaration that, in the exercise of that power, he shall "contribute a certain percentage to the public use; in "other words, that the right to dispose of his property "by will shall remain, but subject to a condition that the "state has a right to impose."

This being so, the present inheritance tax law of the United States operates to limit or restrict the power of the Legislatures of the different states, to regulate the descent or transmission, by will, of property within the different states. Such power is not vested in the United States, by any power of taxation that is conferred upon it by the constitution, and the attempt to exercise such power is clearly unconstitutional.

Reference is frequently made to the language of Mr. Chief Justice Marshall, in writing the opinion of this Court, in *McCulloch* v. *State of Maryland,* 4 Wheat. 316, 431, as follows:

"*That the power to tax involves the power to destroy;* "that the power to destroy may defeat and render use- "less the power to create; that there is a plain repug- "nance, in conferring on one government a power to "control the constitutional measures of another, which "other, with respect to these very measures, is declared

"to be supreme over that which exerts the control, are "propositions not to be denied. But all inconsistencies "are to be reconciled by the magic of the word confi- "dence. Taxation, it is said, does not necessarily and "unavoidably destroy. To carry it to the excess of de- "struction would be an abuse, to presume which would "banish that confidence which is essential to all govern- "ment."

It is altogether probable that the first sentence of this paragraph has been largely misunderstood, and its true meaning is not to-day fully appreciated. The power to tax *"involves"* the power to destroy, in so far as the power to tax takes away from the owner his own property. If the whole of a man's property is taken away for public purposes, it is hardly conceivable that it can be taken, except by virtue of the power of eminent domain (and not by virtue of the power of taxation), in which event recompense will be made to the owner.

If taxation goes to the extent of taking the whole of the property of a citizen, then—under the requirements of the constitution for uniformity of taxation, or for such an apportionment as will produce equality—the destruction which follows taxation will inevitably be the destruction of the whole of the property of the whole country, and that means of the government itself.

Such could hardly have been the meaning of the learned Chief Justice. Yet he was wise in saying that such extremity of taxation would be an abuse, to presume which would banish the confidence which is essential to all government. Inasmuch as the taxpayers constitute the government itself, it is inconceivable that taxation can be carried to the extent of destruction.

The pursuit of this question, however, is liable to lead into the field of metaphysics, and to serve no particular purpose in reaching a determination of the questions before the Court. It is deemed, however, pertinent to refer to this remark of Chief Justice Marshall, because it directs attention, sharply, to the restrictions upon the power of taxation, which stand between the exercise of that power and destruction.

There never will be destruction of property by taxation under the constitution of the United States, because of the limited powers of taxation conferred by the provisions of the constitution. There may not be direct taxation, except upon the same lines of apportionment which regulate representation in Congress. There may not be the levy of duties, imposts or excises, unless they be uniform throughout the United States. It is because of these constitutional provisions and prohibitions, and because the general government has no powers except delegated powers, that it is impossible that taxation in the United States can ever reach to the extent of destruction.

To apply these remarks to the present case, it is in the line of destruction that this law goes outside of the limits of uniformity prescribed by the constitution, and undertakes to establish unequal taxation. Thereby it becomes destructive, and is therefore subject to restraint by this Court.

If a legacy may be subjected to a tax of five per cent. when it comes from a testator worth $25,000, and subjected to a tax of fifteen per cent. if the testator be worth a million of dollars, then when a testator is worth fifty

millions of dollars, it will be within the power of Congress to say that no hospital, collegiate institute, stranger or next of kin, shall receive a legacy from him, without paying ninety, ninety five or ninety-nine per cent. As a logical sequence the power to tax must involve, beyond question, the power of destruction. But against such power of destruction, this Court is called upon to intervene and to interpose the protection afforded by the constitution, when it says that such taxes shall be uniform. If it is within the power of Congress to confiscate a portion of the estate of a decedent, because of his death, and because of inheritance from him, the power of Congress must be restricted by those provisions of the constitution, which require the imposition of a tax to be uniform.

POWER TO TAX RIGHT OF INHERITANCE.

The foregoing statement of the views of counsel leads logically to the consideration of the next proposition, which is the *want of power of Congress to impose a tax upon right of inheritance given by a state.*

It is beyond the constitutional powers of Congress to impose a tax upon a right or privilege of inheritance created by the Legislature of a state and solely dependent upon the statutes of a state.

So much has been said upon this proposition in the briefs of other counsel who are united in resisting the

enforcement of the tax in question, that it is not considered necessary to make an elaborate argument upon this point. Reference is made to the briefs of other counsel, as being sufficient to induce the Court to render its decision, in accordance with the propositions sought to be maintained by the plaintiffs in error. What is said, however, under this point, may be considered as in support of the proposition asserted, that the law in question is not uniform in its action.

Aside from the objections that may be made to this act of Congress, because of its imposition of a greater tax upon property that comes from a millionaire than from property which comes from persons of lesser wealth, there is an unjust discrimination against the recipients of an estate left by a decedent. No matter what may be the wealth of a person from whom the estate proceeds, if the recipient of that estate be a husband or wife, the government derives nothing by way of revenue from the estate of the decedent. If the beneficiary of a decedent, whether under a will, or under the state laws of inheritance, be a lineal descendent of the decedent, a tax is imposed upon the estate he receives, varying from seventy-five cents on the one hundred dollars, to two dollars and twenty-five cents, according to the wealth of the decedent. If the beneficiary of the estate be a stranger in blood to the decedent, or a corporation, and the estate of the decedent exceed ten thousand dollars, the tax imposed upon the administrator of the estate—to be deducted from the legacy, or beneficial interest passing to the beneficiary—will vary from five to fifteen per cent.

It is claimed that there is a lack of uniformity in

the imposition of this tax, not only because of the varying amount of the tax, in proportion to the wealth of the benefactor or decedent, but also because in the different states there are different rules and legislative enactments governing the transmission of property of decedents.

This act that is under consideration relates not only to the property of those who die leaving wills, but also of those who die intestate. The portion of an estate of a decedent, which a widow takes in case of intestacy, is not the same in one state that it is in another. In the state of New York a widow will take one-third of the personal estate of her husband, in case of his intestacy, and one-half, with something additional, in case he die leaving no lawful descendants. If he leave no children, but leave brothers and sisters, the widow will take two thousand dollars of his personal property, and one-half of the remainder of his personal property. These provisions are alike, whatever may be the source from which the income is derived. In the State of Ohio the law is very different. In case the husband dies leaving no lawful descendants, and leaving an estate which did not come by descent, devise, or of gift, the whole of it will pass absolutely to the wife.

It would seem as if the statement of the provisions of the law of these two different States, ought to be sufficient to convince this Court, that the law under consideration imposes a tax which is not uniform. In part, its lack of uniformity comes from the fact that the Congress has undertaken to regulate the right of succes-

sion in the different states. The law seems to be, that the different states may give a right of inheritance in cases of intestacy, subject, however, to the provision that the government receive therefrom a certain revenue. When defining what that revnue is to be, the Congress undertakes to say, that it shall be apportioned in accordance with the proximity of blood relationship of the beneficiary to the decedent. It undertakes to make the same rule applicable in cases where distribution of assets comes under the statute, and where it is provided for by will. The rate of taxation is the same in cases of intestacy as it is in cases of testamentary disposition of property. The laws of different states regulating descent of property and distribution of estates vary. This law of Congress, undertaking to recognize the classes that have been created, and may lawfully be recognized in different states, and undertaking to adopt those classes as a basis of disposition, puts itself in antagonism with the constitutional provisions requiring uniformity of taxation.

In the first place, it cannot be conceded that the United States may impose a tax upon an inheritance by a child, and let go free the estate which passes to the widow. In the second place it cannot be conceded that a child of a comparatively poor man, may be made the recipient of a legacy, and subject to the payment of a small tax, while he can not receive a similar legacy from a party as nearly related to him, but wealthier, without paying a greater tax. In the third place the estate may be wholly exempt if the original owner died

intestate in Ohio, but subject to tax if he died intestate in New York.

This brings us up to the consideration of the point, that even if those *dicta* shall be upheld, which say that the only uniformity required in the imposition of duties, imposts and excises is, that the taxes shall be territorially uniform, the lack of uniformity between different states is sufficient to require the Court to declare void the present law..

Without considering the provisions of other states, and considering merely those of the two to which attention has been directed above, viz., Ohio and New York, it appears that in cases of intestacy in the state of New York, if a decedent leave a widow and no child, his widow will take for herself and have one-third to one-half of his personal property. In the state of Ohio, if a man die intestate, leaving a widow and no children, his widow may take the whole of his personal estate.

This law of Congress under consideration, then, is so framed, that in the state of New York the estate of a decedent may be subjected to a tax upon one-half thereof, while in the state of Ohio, the estate may go entirely clear of taxation. This instance is cited in support of the main proposition, that the Congress has not right or power to regulate inheritance or succession to property, in cases of intestacy, or in cases of testamentary disposition, and the recognition of the inheritance laws of the different states necessarily involves considerations which must result in such an interference with the uniformity of taxation required by the fundamental law of the land

as to make the imposition of such a tax as that now in question unconstitutional and void.

As a further illustration there may be cited a true incident, and not a case merely suppositious. Franklin Townsend, of the city of Albany, New York, died since the enactment of the statute in question, leaving an estate of between one and two hundred thousand dollars. In and by his will he gave to a servant in his family the small legacy of fifty dollars. That servant could not receive that legacy without paying to the government ten per cent. of its amount. Her legacy of fifty dollars was reduced to forty-five dollars. Had Mr. Townsend been worth less than ten thousand dollars, this faithful servant would have received the whole of her legacy. Had he been worth more than a million dollars, instead of paying the government five dollars, she would have had to pay it seven dollars and fifty cents. Such a tax is not uniform.

It has happened recently that an eminent citizen of the state of New York died, leaving a fortune estimated at from fifty to one hundred millions of dollars. Such bequests as he gave to charitable societies, hospitals, orphan asylums and strangers in blood, are subject to a tax of fifteen per cent. Such legacies as were left to his lineal descendants are subject to a tax of two and twenty-five one-hundredths per cent. The tax is not uniform, when considered merely with reference to those parties who became recipients of the testator's bounty. If the present law is upheld as constitutional, the lack of uniformity may be extended by further provisions in the exact line of the present enactment. Thus

it may exist that if the decedent leaves more than five millions of dollars, the minimum rate of tax prescribed by the statute shall be multiplied by four. If he shall leave more than five millions of dollars, the minimum rate of taxation shall be multiplied by five, and if he leaves more than fifty millions of dollars, the maximum rate of taxation may be more than twenty times as great as the minimum;—thus making an absolute confiscation of a whole estate. In other words, the power to tax would be carried to the actual extremity of confiscation.

TAXATION OF GOVERNMENT BONDS.

In the Murdock and Sherman cases it has been made to appear, that a large portion of the estate of the decedent, and at least one-third thereof, was invested in so-called government bonds. These bonds do not require description, and the words used in stating what they are, do not require definition. It is a matter of common history, that the government of the United States has from time to time borrowed money, and to secure repayment of the sums of money borrowed, has issued bonds such as are described in the complaint in the Murdock case, and in the petition in the Sherman case. These bonds provide that the United States will pay the principal sum specified in them, with interest according to the terms therein mentioned. With reference to such bonds, the Congress has enacted (R. S. Sec. 3701):

"All stocks, bonds, treasury notes, and other obliga-
"tions of the United States, shall be exempt from taxa-
"tion, by or under state or municipal or local authority."

Of course, this provision of the statute does not make these bonds exempt from taxation, under the authority of the United States. It is not because of this statute that such exemption from taxation is claimed for these bonds. It is, however, claimed that the United States has bound itself, by its solemn agreement, to pay, with interest, the principal sum specified in each one of these bonds, and it is not within the province of the Congress to vary that agreement.

The education of a lawyer oftentimes is very narrowing to his intellect. If the line of cases in which he is called upon for his services involves decisions which are to depend solely upon technical rules for the construction of the language of statutes, his attention will be so diverted to mere hair splitting, that he will be apt to lose sight of the general underlying principles which should control the courts in deciding cases upon principles of justice, where such principles are invoked and should prevail.

In interpreting the constitution of the United States, it is belittling to consider that an interpretation must rest upon a technical use of particular words, without reference to the grand fundamental principles upon which that constitution is based. It has been said, above, that the government of the United States has only delegated powers. In the restrictions that have been placed upon the states in the constitution, it has been provided amongst other things, that no state shall pass a "law impairing the obligation of contracts." It has not been imposed upon the Congress that it shall not

pass a law impairing the obligation of contracts. In the Legal Tender Cases (12 Wall. 457, 458), it is expressly decided that the inhibition placed by the constitution upon the states, against acts impairing the obligation of contracts, does not apply to Congress. It has likewise been held in many states, that the different provisions of the constitution, in restraint of the action of the states, do not apply to Congress. All this is well recognized, and the iniquity of conclusions that may be drawn therefrom is only equalled by the stability of the foundation upon which the main proposition rests. The constitution says, that a state shall not pass a law to impair the validity of a contract. It does not say that Congress may not pass such a law. If it be an inference from this that Congress may pass a law impairing the obligation of a contract, and that this is one of the powers delegated to Congress, it is of course, the duty of this Court to uphold the power of the Congress. The constitution says (Art. 14), that no state shall deny to any person within its jurisdiction the equal protection of the laws. If this means that, while a state may not, the Congress may, deny to citizens the equal protection of the laws, it is time that the constitution was changed.

In *Lake Shore Railway Co.* v. *Smith* (173 U. S. 684), this Court held unconstitutional laws of a state which required a railroad company to sell mileage tickets at a less rate than was fixed for the sale of single trip tickets. The basis of this decision was, that the law created classes, and gave to a person able to buy a thousand miles of travel, privileges which were not accorded to the purchaser of single trip tickets. It was therefore a

violation of that part of the constitution which prohibits states from denying the equal protection of the laws. The constitution does not say in so many words, that Congress shall not deny to persons within its jurisdiction the equal protection of the laws, but it is humbly conceived that this is one of the implied provisions of the constitution, which is a fundamental principle of the government, of the power of which the constitution is descriptive.

It is a negation of power, it is true. At the same time, it would seem that it ought not to require argument to show that it is unnecessary to impose upon the Congress a prohibition of power to be unjust or discriminating.

It ought to be, if it be not, a fundamental principle of our government, whether within the lines of the written constitution or not, that equal and exact justice shall be done to all, and that no discrimination shall be made by Congress, or by virtue of any law of Congress, in favor of one individual as against another. A tax law ought not to discriminate in favor of, or against, a rich man or a poor man, a man with a wife and child, or a bachelor with no family. Certainly, when it comes to the question of a charitable bequest, discrimination ought not to be made against a bequest that comes from a wealthy man, from whom the largest bequests of a charitable nature are to be expected.

When, however, there is to be considered the question of taxation upon government bonds, there is a question that transcends technical rules that may be written to render certain the provision of any law which speaks of acts legislative impairing the obligation of contracts.

Let it be conceded that the Congress has power to pass such laws as shall utterly ignore contracts made between the states and between different parties. So long as it confers upon the courts power to sue the United States, it must leave the courts with full jurisdiction to grant and enforce judgment against the United States, upon such contracts as the nation has made. When the United States, in due form of law, issued to Mrs. Sherman its obligations to pay to her $500,000, with interest, and put those obligations in the form of negotiable securities, and likewise provided that the courts might be open for the enforcement of claims against the United States, it was put within the power of this Court to render judgment against the United States upon its contract with Mrs. Sherman.

Although the question comes before this Court in form different from that which would occur had she held the bonds until they became due and then had sued upon them, we have the same principles of law and equity to pass upon as if she had filed her petition in the Court of Claims upon the maturity of her bonds, and had asked the aid of the Court in recovering against the United States the sum of money which the government has agreed to pay upon the bonds held by her. Supposing in answer to such a petition, the government had set up an act of Congress, declaring that payment should not be made upon such bonds, until there had been deducted from the face value thereof fifteen per cent. In effect, the claim would have been exactly the same claim that is made by the government in this case.

The beneficiaries under Mrs. Sherman's will, other than her heirs-at-law and next of kin, are prohibited from having the goverenment bonds which are required to pay their legacies, until they part with fifteen per cent. of their value. The government stands in this case, in the position of saying,—we have borrowed your money from you, we have promised to pay one hundred cents on the dollar, with interest, but because you have chosen to part with this obligation,—by taking occasion to make a will and then to die,—we insist upon it that the trustee in whose hands you have placed the bonds for the purpose of their transmission, shall pay to us fifteen per cent. of the face value of the bonds.

In other words, we have agreed to pay, but will not pay, except as we repudiate fifteen per cent. of our obligation to pay.

It is believed this is not the law, and certainly, it is not equity. We are in Court the same as if we came here suing the United States upon its bonds. We are entitled to judgment upon the contract, and it is not within the power of the government to defeat or prevent a judgment or reduce its amount by claiming a recoupment authorized only by its own arbitrary act, whether called an act of taxation, or an act of confiscation, or an act of repudiation. The government has promised to pay so many dollars, and so much interest. When it repudiates its contract, the holder of the obligations of the government comes into Court, and demands judgment for the face value of the obligations. That holder is entitled to judgment for the full amount, but cannot have that full amount, if the government may arbitrar-

ily strike off five, fifteen or ninety-five per cent. of the amount that is due according to the terms of the contract.

If such a position as that occupied by the government, be tenable in law, it must fall under the condemnation which is pronounced by Mr. Chief Justice Marshall, in *Fletcher* v. *Peck* (6 Cranch, 87, 132):

"*And for a party to pronounce its own deed invalid, "whatever cause may be assigned for its validity, must "be considered as a mere act of power which must find "its vindication in a train of reasoning not often heard "in courts of justice.*"

It is believed that this is the first case in which an attempt has been made upon the part of the government, to repudiate the obligations that are contained or expressed in written promises issued by it. It is not a mere question of the imposition of a tax upon dead men's estates; it is not a mere question of robbing infant children and orphan asylums. It is a question that reaches the honor of the government itself; it is a question of power to repudiate, as well as of the morality of repudiation, by the government, of its solemn obligations; it is a question of whether the government may borrow from one of its own citizens, or from a money lender abroad, and then repudiate its contracts by the use of language importing the imposition of a tax upon the money represented by the bonds of he government.

It would make no difference if it should be held that this tax purports to be imposed upon the inheritance of the government bonds, and not upon the bonds themselves. If it be within the power of Congress to impose

a tax upon an inheritance of the bonds, it is within its power to impose a tax upon any transfer of the bonds. If it be within its power to impose a tax upon any transfer of the bonds, it is difficult to understand why it is not likewise within its province to impose a tax upon the ownership of the bonds. If there may be imposed a tax of fifteen per cent. upon the inheritance of the bonds, no substantial reason exists why there may not be imposed a tax of ninety-five per cent. upon similar inheritance. If Congress has the power to make in the amount of its tax, a discrimination between individuals from whom the bonds are transferred, it may make discrimination as well when the transfer is in the lifetime of the original owner, as when it is upon his death. Having promised to pay one hundred cents on the dollar, it may evade that promise, by imposing a tax of fifteen or fifty per cent, upon every transfer of its obligations.

To sum up the whole thing, if this law may be upheld, in so far as it imposes a tax upon an inheritance of government bonds, the same reason which will uphold the law, will uphold any act of Congress repudiating the payment of the whole debt repudiated by the bonds of the goveernment. At present, we are not under the necessity of discussing the validity of any such act of Congress, but when we come before this Court substantially in the same position as if we were suing upon the obligations of the government, we have a right to ask the Court to regard the petitioner in a position the same as if he were demanding one hundred cents upon the dollar of the obligations issued by the government. By that is

meant, that if he were suing upon the original bonds, it would be no defence for the debtor to say that it had concluded to pay only eighty-five cents on the dollar. Judgment should go for the full amount. If by virtue of threats of imprisonment and confiscation of property, the government has chosen to say, that it will reduce indebtedness by fifteen per cent., this Court ought not to recognize that act of the government, any more than it would if judgment were being asked in a direct suit upon the original obligation.

The position of the plaintiffs in error cannot be evaded by the government, upon the authority of cases which have decided that it was within the power of the government to impose a duty, impost or excise, upon transfers of property, or devolution of title. The language of this act takes the present case out of the authority of those decisions which have passed upon the validity of other taxes imposed by the Congress, where the tax was clearly upon transfers of title.

In some respects, the language used in this War Revenue Law is inconsistent in its different provisions. For instance, section 29 commences with a declaration that the persons having in charge or trust, as administrators, executors or trustees, legacies or distributive shares, *"shall be and hereby are made subject to a duty or tax."* In section 30, the tax required to be paid is *"The duty "or tax assessed upon such legacy or distributive share,"* —and further on it speaks "of *the amount of such leg- "acy or distributive share*, together with *the amount of "duty which has accrued or shall accrue thereon."*

It has been attempted to show in the preceding pages of this brief, that the tax complained of is a direct tax, because imposed upon the executor having charge of the estate. The language used in section 30 would seem to indicate that a tax is imposed upon the legacy or distributive share itself, but in either case, it cannot be contended that the tax was imposed, or attempted to be imposed "upon devolution of title," or "transfer" by will.

In *Scholey* v. *Rew* (23 Wall. 331), the decision is placed squarely upon the ground (p. 348): "That the "subject matter of the asssment is the devolution of the "estate or the right to become beneficially entitled to the "same, or the income thereof, in possession or expect- "ancy, under the circumstances and conditions specified "in the other parts of the section."

In the various cases decided by this Court, and reported in 173 U. S. 509, and entitled variously "*Nichol* v. *Ames*," "*In re Nichols*," "*Skillen* v. *Ames*," and "*Ingwerson* v. *United States*," the decision was with reference to a construction of section 6 and a portion of schedule "A" of this Act of Congress now under consideration. In the opinion of Mr. Justice Peckham in these cases, he says (pp. 518, 519):

"Various cases are cited, from *Brown* v. *Maryland*, "12 Wheat. 419, down to those involving the validity of "the income tax, 157 U. S. 429; 158 U. S. 601, for the "purpose of proving the correctness of this proposition. "All the cases involved the question *whether the taxes to "which objection was taken amounted practically to a "tax on the property. If this tax is not on the property "or on the sale thereof, then these cases do not apply.*"

The application of the various cases referred to by the learned justice seems to have been made to depend upon the question whether the tax under consideration was on the property, and when he says that if the tax was not on the property, or on the sale thereof, the cases do not apply, the Court makes inapplicable to the present case the authority of the cases last cited.

The tax that was there under consideration was upheld, because "the tax is in effect a duty or excise laid upon the privilege, opportunity or facility offered at boards of trade or exchanges for the transaction of the business mentioned in the act." If the Court had reached the conclusion that the tax was upon the property itself, it is reasonable to infer that the decision would have been different.

There is no possible construction that can be given to section 29 now under consideration, which can vary its meaning, as expressly stated in the language used therein, that the executor himself should be subject to the tax, unless it be the language used in the same act, which speaks of the tax as assessed upon a legacy or distributive share.

In either event the tax is a direct tax upon person or property, and in so far as it is made applicable to the government bonds referred to, it cannot be defended by any subterfuge in the use of language that it was not intended to be a tax upon the bonds themselves.

GENERAL REMARKS.

It has been learned by counsel presenting this brief that other counsel holding the same position that is attempted to be here taken have filed their briefs, in which an elaborate review is made of the various previous decisions of this Court. It is for this reason that there has not in this brief been attempted an elaborate analysis of other cases decided by this Court or other cases to which attention of the Court has been called.

It is believed that the question as to the taxation of government bonds, is practically of first impression. If that question be not considered, in connection with the disposition of the question of the constitutionality of the law now being considered, in the other cases before the Court, it is probable that opportunity will be asked to make more elaborate the argument which is presented upon that question.

What has been said above seems to be sufficient to require a disposition of that question in favor of the plaintiffs in error. Nevertheless, it is considered that probably further research, and a more elaborate presentation of argument may aid the Court in a satisfactory disposition of the question.

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SUPPLEMENTAL BRIEF

Supreme Court of the United States.

OCTOBER TERM, 1899.

GEORGE T. MURDOCK, as executor, etc., of Jane H. Sherman, deceased, *Plaintiff in Error,* *against* JOHN G. WARD,, Collector, etc. *Defendant in Error.*	No. 458.
GEORGE D. SHERMAN, *Plaintiff in Error,* *against* THE UNITED STATES, *Defendant in Error.*	No. 459.

Supplemental Brief for Plaintiffs in Error.

Counsel for the plaintiffs in error is somewhat in doubt as to whether or not the privilege of filing an additional brief is limited strictly to a reply to supplemental brief filed by the Solicitor General. It is not intended to take advantage of the privilege of filing a further brief, or of the courtesy of the court, by introducing matters that have been presented on the main argument,

and the discussion of which is supposed to have been exhausted.

It happened that the brief upon the part of the government was not filed with the clerk until the afternoon of Monday, the 4th of December, and the argument of the cases commenced on Tuesday. It is true that on Saturday, the 2d of December, some of the counsel for the appellants and plaintiffs in error were privileged to see the galley proofs of the brief of the Solicitor General, but aside from this, there was no opportunity to file a brief in reply at any time before the argument.

The position taken by the Solicitor General was so novel, that it had not been anticipated, except to a very limited extent. It was conceived that the case opened up full opportunity for a discussion as to the tax being a tax upon property, and it was anticipated that there might be raised and opened the question of a tax upon inheritance or devolution of title. None of the counsel representing appellants or plaintiffs in error, had anticipated that the government would rest its case solely upon a claim that the tax in question was *a duty or excise "upon the right or privilege of the owner of property to "transmit it on his death, by will or descent, to certain "persons."*

POSITION OF THE GOVERNMENT.

The paragraph or point upon the original brief of the government numbered "V" seems to take the position, and to claim, that it is not the person of the executor, administrator or trustee upon whom the tax is imposed.

The tax is not upon the property in the hands of the executor or administrator.

"A careful reading of the act does not lead to the con-"clusion that Congress intended to tax the privilege "of receiving a legacy or distributive share."

Reasoning thus by exclusion, the conclusion is reached that the tax is "a duty or excise upon the right or privi-"lege of the owner of property to transmit it on his "death."

Amongst other answers that may be made to this propositions is this: THE STATUTE DOES NOT SO IMPOSE THE TAX.

It may be further said that if the tax is upon such a right or privilege, there must go free estates that are now subjected to the tax, where by reason of the decedent's being *non sui juris,* he is possessed of no privilege which he can exercise.

The learned Solicitor General anticipates and undertakes to avoid the objection to his argument that the statute does not by its language impose a tax upon the privilege of transmitting an estate by taking the position—as he does in his point numbered "IV"—"that "the constitutionality of a law making an exaction for "purposes of revenue, depends upon its operation and "effect, and not upon the form it may be made to as-"sume." To a certain extent, this may be true, but when applied to particular cases, it is fallacious.

The object of the law in question was the collection of revenue;—its operation and effect were to accomplish that object. Carried to its full extent, the argument

upon the part of the government would be, that any law which provides a revenue, is constitutional. This, of course, will not be contended for. But if the law is to be measured by its operation and effect, it would seem to be incontrovertible that an unconstitutional law may be as operative and effective, for the purposes of raising a revenue, as one that is constitutional. If the test of the constitutionality of a law be its operation and effect, and if the purpose of the law be within the limits of the constitution, there are few laws that will require the aid of this court in their construction.

The argument of the Solicitor General seems hardly to stop short of the proposition that if Congress, for the alleged purpose of collecting revenue, should pass a law, that, construed strictly, or construed liberally, would be, upon its face, unconstitutional, the Department of Justice may interline between the title of the law and the alleged object for which the law was enacted, a new statute, which in its terms shall be constitutional. If the Congress should impose a direct tax upon individuals, disregarding the rules of apportionment prescribed by the constitution, such a law would be acknowledged by all to be unconstitutional. If the position of the Solicitor General in this case be sound, solely and only because the object for which revenue is to be raised is lawful, and in its operation and effect that object is accomplished, the court will be called upon to disregard the unconstitutional features of the law, also to disregard the plain language of the statute, and to construe the law as levying a duty or impost, or excise,

upon some intangible right or privilege which pertains to the person assessed for the tax, and which is nowhere mentioned in the statute.

The position of the United States is absolutely untenable, that the tax under consideration is a duty imposed upon the privilege of transmitting an estate of a certain value to persons of a certain degree of consanguinity or to strangers. The learned counsel for the government has not answered the suggestion made to him, that where a person dies intestate, he does not exercise any such privilege. If he had made the only answer that it is conceivable can be made to this, the answer would fall short of meeting the objection to his proposition. He might say that the person dying has the privilege, although he does not exercise it. In the same way it may be said, that every man, fifty years of age, has had the equal privilege with other more enterprising citizens, that have outstripped him in the race for wealth, of being a millionaire. The privilege has never been reduced to possession, except in comparatively few instances. It would be unjust to impose a tax upon a man, or upon his estate, upon the basis of his being a millionaire, merely because he had a right to be one, but had never exercised the right. So it may be said that a tax could not be imposed upon an intestate because of his privilege of transmitting property, when he never exercised that privilege.

If the contention of the appellants and plaintiffs in error is defective in regard to this position, there still remain the cases of infants and lunatics, who have not,—

and who die without ever having,—the privilege of transmitting property. The tax should not rest upon them under the circumstances, and under the contention of the defendant in error, their estates should be exempt. In such case there would be a violation of rules of uniformity whether the word be used in its natural, literal sense, or be construed unnaturally and restricted to the forced construction of geographical uniformity.

In escheats the state takes the whole property, but if this law be enforced it must be subject to the tax.

UNIFORMITY.

If the tax in question be construed to be a duty, impost or excise, the question as to what constitutes uniformity in the imposition of such a tax, was so fully discussed on the oral argument, as well as in the briefs filed with the court, that it may be considered an encroachment upon the privilege of filing an additional brief, if an attempt be made to add anything on that subject.

If the court be of the opinion that that subject is fully exhausted, and no privilege to make additional suggestions with regard to it has been accorded to counsel, it is respectfully asked that the suggestions now here made, be passed and omitted from the perusal of the justices, without rebuking counsel for presenting them.

There seems to be no escape from the position that if the word "uniform,' as used in the constitution, is to be accorded its ordinary, broad, legitimate definition, such a tax as is here imposed cannot be upheld as uniform.

The claim, however, is made, that the words "uniform "throughout the United States" imply mere geographical or territorial uniformity.

Questions were asked counsel engaged in the argument of this case, by certain of the justices, which evidently made reference to a lack of uniformity common under correct internal revenue legislation, and such as has prevailed without question from the commencement of the constitutional government. For instance, there is a tax upon whiskey, which is the same upon that commodity when of different qualities or different values. There is a custom duty upon the importation of sugars, which is specific and uniform in amount, without regard to the quality of the sugars imported. The inquiry is natural if such laws can be upheld as constitutional, why do they not afford ground for limiting the word "uniformity?"

The question is exceedingly pertinent, and the position assumed in asking it is strongly entrenched behind the argument which comes from a continued line of legislation for the collection of customs upon imports, as well as for the collection of internal revenue. At the same time there seems to be a fundamental error in taking this position and which comes from disregard of the historical definition, which belongs to the words "duties, imposts and excises." When those words were incorporated into the constitution, they had already acquired a significance which was based, to some extent, upon the practice of governments in imposing taxes of the classes mentioned. The very words, "duties, im-

posts and excises" included within the legitimate definition of those words, the *classification* of articles that were subject to such taxes.

A duty, whether a customs duty, or an excise duty, would cease to be a duty, as the word was then used and properly defined, if under the right of impost duty there were not the right to annex to it all the usual concomitants and accessories. In the constitution, the particular words referred to must have been used with reference to the particular rules, methods and customs which prevailed in the imposition, by all countries, of duties, imposts and excises. There was no intent, therefore, in the requirement that such taxes should be uniform, that there should not be a classification of the articles under them. If admitting this seems to give strength to the position taken by the government, that the word "uniform" is satisfied, if the revenue laws are geographically uniform, it, nevertheless, does not follow, that because there may be classification of articles subject to tax, without infringing upon the right to use the word "uniform," therefore the use of the word uniform is satisfied if the law be the same in every place throughout the United States.

The opinion of Mr. Justice Miller in the *Head Money Cases* (112 U. S. 580, 594), is frequently quoted upon the question of uniformity of taxation, and is relied upon as establishing, or if not establishing, as a strong argument in favor of so construing the word "uniform," as to restrict its use. He says: "The tax is uni-"form when it operates with the same force and effect

"in every place where the subject of it is found." The force of the argument in favor of geographical uniformity, seems to rest upon the words "in every place." What becomes of the words that are used in the same sentence, "with the same force and effect," and "where the sub-"ject of the tax is found?"

The subject of the tax in this case, is not a subject that has varying qualities and varying values. The subject at all times is "legacies or distributive shares arising "from personal property. The tax, if not a direct tax, upon the administrator, executor or trustee, is a tax assessed upon the assets of the estate of the decedent. Gross assets are reduced to cash,—theoretically, if not in practice,—and the tax is upon different portions of those assets, not by a rule that operates with the same force and effect wherever assets are found, but according to rules which vary, and which vary geographically, as well as vary in single localities. The tax does not operate with the same force and effect in every place, where the subject of it is found. The subject of the tax is subjected to different gradations, according to various circumstances, in the same locality, and in different localities according to varying rules, which distinguish the laws regulating the distribution of assets in one state, from those which obtain in another.

While it may be conceded, and is probably true, that there may be an unvarying tax of a dollar and ten cents a gallon upon grades of whiskey manufactured in the United States, regardless of the quality of the whiskey, or that the tax may be lawfully varied according as the

quality and grade of the whiskey vary, there would be a lack of uniformity, if the tax should be imposed upon the purchaser of the whiskey, and should vary not only because of classification with reference to its quality, but also by classification dependent upon the wealth of the distiller who manufactured the whiskey.

The subject of the tax is the whiskey. That tax will not operate with equal force and effect, in every place where the whiskey is found, if the tax varies in proportion to the wealth of the distiller.

As defensible as is the present law, would be the law that provided that a man who purchased his whiskey from a dealer that was not worth ten thousand dollars, could have it free of tax, while if he purchased from a dealer that was worth more than a million of dollars, he must pay fifteen per cent. tax. It could hardly be contended that such a law as is here suggested, would be constitutional, yet it is parallel with the law now under consideration.

"It is of the very essence of taxation that it be levied "with equality and uniformity, and that there should "be some system of apportionment."

Cooley, Const. Lim. 495.

"It is a sacred duty to impose the burdens equally, "and to enforce the maxim of law and ethics that equal-"ity is equity."

People v. *Commissioner of Taxes*, 76 N. Y. 64, 71.

"Equality of taxation is a fundamental principle of "our government which no legislation, in the absence of "the most explicit provisions, will be presumed to have "intended to violate."

People v. *Supervisors of New York*, 20 Barb. 81, 88; S. C., affirmed, 16 N. Y. 424.

The reason for the use of the words under consideration in the constitution, is not found solely in a desire to protect the residents of one state from the imposition of taxes that should not be imposed upon equal terms in other states. There must of necessity have been in the minds of the delegates to the convention framing the constitution, that this was to be a Republican form of government, where classes were abolished, and where the tax-imposing power was vested in the voters. The then current history of European, to say nothing of Asiatic countries, must have brought to the minds of the framers of the constitution, the evils that existed, and had existed, for hundreds of years, in monarchical governments, where estates of single, wealthy individuals would oftentimes be absolutely confiscated, for the purposes of raising revenue, while court favorites would be permitted to escape the payment of any tax whatever. There was need for imposition of some restraint upon the power of the Congress to discriminate, or to make classes, arranged according to difference in wealth. When direct taxes were under consideration, the apportionment of such taxes upon the same lines that control the apportionment of representatives, seemed to provide ample security.

Upon the question of duties, imposts and excises, protection could be had by making them all uniform, so that the tax should bear equally upon rich and poor alike. This leads to a construction which seems to be reasonable, and to produce a far more salutary effect than will result from the adoption of the narrow use of the word "uniform," that is contended for by the government.

No one has heard from the plaintiffs in error in any of these cases, the expression of solicitude for the future of the republic, which is referred to on page 43 of the brief for the government. It is not believed that the end of the government will be at hand, by reason of any decision which this court can possibly make in this case. At the same time, it must be apparent, that if the classifications that are found in this law are upheld by this court, as within the power of Congress, then Congress can exercise the power of taxation, to the extent of the absolute destruction of any particular class of citizens who may be obnoxious to the majority which elects the members of Congress.

If Congress may make a line of exemption at $10,000, it may draw that line at $100,000, or it may draw it at $1,000,000. If it may impose a tax of fifteen per cent. upon estates of more than a million of dollars, it may impose a tax of fifty per cent. upon like estates, or ninety-nine per cent. upon estates of upwards of $5,000,000.

If such powers exist, it will be because this court will construe the word "uniform" in an unnatural and nar-

row sense; while giving to that word its natural and legitimate signification, will result in a beneficial construction of the constitutional provision in question, which will be conservative and a protection againnst inequality.

It has been suggested that all governments at all times recognize certain amounts and certain classes of property as worthy to be exempted from taxation, and that a right to make certain exemptions exists. This may be conceded to be true to a certain extent. It is not true to the extent that, under our constitution, the Congress has power arbitrarily to pick out certain classes, or certain amounts of property, without any good reason therefor, and exempt them from taxation, at the same time imposing a heavy tax upon other properties of the same kinds and qualities, when held by other individuals.

In this case, estates of $10,000 or less are absolutely exempted from taxation. Of course, this exempts by far the largest portion of the whole population, when numerically considered. It exempts more than half of all personal estates.

It may be said that if Congress may draw the line, it may draw it where it pleases. If this be so, this exemption must be upheld, even though it discriminates against the rich and persons in moderate circumstances. It is believed, however, that it is not true that Congress has a right to fix a line of distinction, wherever it may choose to draw that line, for the purposes of taxation, and it is also insisted that the line is drawn here in an unreasonable way, and so as to exclude whole townships

and counties, and the great bulk of personal property in the whole country. A line may properly be drawn, when the amount exempted is so small that the maxim *de minimis lex non curat* will apply, or when the collection of the tax will involve more expense than the amount of the tax itself. When we go far beyond such a line as that, and make a distinction which involves a difference, actually of wealth itself, the uniformity provided for by the constitution is destroyed.

LACK OF GEOGRAPHICAL UNIFORMITY.

Aside from the question that was raised by Mr. Carlisle upon his brief, of the omission from the District of Columbia from the operation of this tax, there is a lack of territorial uniformity, by reason of the different laws of intestacy in the different states. That such differences exist, the different members of this court must all of them know.

In the brief already filed attention has been called in one instance to the different laws of different states upon this subject. Similar differences exist in different states. Under the rules of the common law, where a married woman died intestate, even though she left children, her husband would take the whole of her personal property. Such, it is believed, is still the law in many states. In others, it has been changed by statute, where it is provided that if a woman dies intestate, leaving a husband and children, the husband will take only one-third, or a half of the personal property, the balance going to the

children. In such cases, if the estate be more than ten thousand dollars, whatever the husband receives, he receives free of tax. Therefore under this law, a personal estate of a married woman dying intestate, would be in one state absolutely free from the tax imposed here and in another state subjected to a tax reaching one-half or two-thirds of the whole personal property. Geographically considered, therefore, the law is not uniform.

In *Gilman* v. *City of Sheboygan* (2 Black, 510), this court adopted an opinion of the Supreme Court of the state of Wisconsin upon the subject of uniformity of taxation, in an opinion written by Mr. Justice Swayne, from which the following is quoted:

"In *Knowlton* v. *The Supervisors of Rock County* (9 "Wis. Rep. 410), the section requiring uniformity of "taxation underwent an able and exhaustive examina- "tion. The Court affirmed the following propositions:

" 'The levying of taxes by the authorities of a county, " 'city or town, for their support is as much an exercise " 'of the taxing power as when levied directly by the " 'state for its support. The state acts by municipal gov- " 'ernments, and their acts in levying taxes are as much " 'the act of the state as if the state acted by its own " 'officers.

" 'The constitution of the state requires, as a rule in " 'levying taxes, that the valuation must be uniform and " 'in all cases alike or equal, operating alike upon all " 'the taxable property throughout the territorial limits " 'of the state or municipality within which the tax is " 'to be raised. And where the legislature prescribed a " 'different rule, the act is a departure from the constitu- " 'tion, and therefore void.

" 'The constitution has fixed one unbending uniform
" 'rule of taxation for the state, and property cannot be
" 'classified and taxed as classed by different rules.

" 'The provision of the constitution, that taxes shall
" 'be levied upon such property as the legislature shall
" 'prescribe, does not sanction a discrimination which
" 'provides for taxing a particular kind of property for
" 'the support of government by a different rule from
" 'that by which other property is taxed; for when the
" 'kind of property is prescribed the rule of taxation
" 'must be uniform. All kinds of property must be
" 'taxed uniformly, or be absolutely exempt.'

"In this case under the provisions of the charter of "the city of Janesville, lands within the city limits laid "out into city lots, and other lands not so laid out, had "been taxed at different rates, and the property of the "plaintiff had been sold for the non-payment of the "taxes. The court held the tax void, and enjoined the "treasurer from executing deeds to the tax purchasers.

"In the case of *Weeks* v. *The City of Milwaukee et al.* "(10 Wis. Rep. 242), the preceding case was considered "and approved by the court. The proposition that the "constitutional provision requiring the 'rule of taxation
" 'to be uniform' extends to municipal corporations, and "that the constitutional provision requiring the legisla- "ture to restrict their powers of taxation was only in- "tended to furnish a further protection, were expressly "and unanimously reaffirmed. They held further, that "where the assessors of the city of Milwaukee, in obedi- "ence to an ordinance of that city, omitted to assess "property to the value of $150,000, which ought to have "been assessed, and that property was thereby exempted "from taxation, the omission was fatal to the entire tax, "and that the complainant's taxes being increased by the

"omission he was entitled to an injunction to restrain "the sale of his lands for such illegal taxes.

"In *Sanderson* v. *Cross* (10 Wis. Rep. 282), the doc- "trines of *Knowlton* v. *The Supervisors of Rock County* "were again unanimously approved.

"In their opinion the court adopt the following lan- "guage from the *City of Zanesville* v. *Richards* (5 Ohio "State Rep. 589): 'The general assembly is no longer " 'invested with the discretion to apportion the tax, and " 'to determine upon what property and in what pro- " 'portion the burden shall be laid. A uniform rate per " 'cent. must be levied upon all property subject to taxa- " 'tion according to its true valuation money, so that all " 'may bear an equal burden.'

"The Ohio case was decided under provisions in the "constitution of that state similar to those in the consti- "tution of Wisconsin, to which we have referred.

"In *The Attorney General* v. *The Winnebago Lake "and Fox River Plank Road Company* (11 Wis. Rep. "42), the court say: 'It cannot be denied that under " 'the power of exemption unjust enactments in respect " 'of the power of taxation might be made. But those " 'who framed the constitution did not see fit to prevent " 'such evils by depriving the legislature of the power. " 'But they did provide that whatever property was " 'made taxable *at all* should be taxed by a uniform rule, " 'which was designed to secure equality in the burdens " 'as between the different kinds of taxable property, " 'but of course not as between property taxable and that " 'not taxable.'

"The court refer with approbation to *The Exchange "Bank of Columbus* v *Hines* (3 O. S. Rep. 1). In that "case the Supreme Court of Ohio say: 'Taxing is re- " 'quired to be by a *"uniform rule"*—that is, by one and

" 'the same unvarying standard. Taxing by a uniform
" 'rule requires uniformity not only in the *rate* of taxa-
" 'tion, but also uniformity in the mode of assessment
" 'upon the taxable valuation. Uniformity in taxing
" 'implies equality in the burden of taxation, and this
" 'equality of burden cannot exist without uniformity
" 'in the mode of assessment, as well as the rate of taxa-
" 'tion. But this is not all. The uniformity must be
" 'co-extensive with the territory to which it applies.
" 'If a state tax, it must be uniform all over the state.
" 'If a county or city tax, it must be uniform through-
" 'out the extent of the territory to which it is applicable.
" 'But the uniformity in the rule required by the consti-
" 'tution does not stop here. It must extend to *all prop-*
" *'erty* subject to taxation, so that all property may be
" 'taxed alike—equally—which *is* taxing by a uniform
" 'rule.'

"We forbear to examine the soundness of the conclu-"sions of the Supreme Court of Wisconsin. They need "no support at our hands.

"We could add nothing to what they have so well and "ably said in vindication of their own views. Such a "discussion would encumber this opinion without throw-"ing any new light upon the subject." (Pages 515, etc.)

POWER OF CONGRESS.

The case of *Brown* v. *State of Maryland* (12 Wheat. 419), is very frequently referred to, and has been referred to upon the present argument several times. As bearing upon the present proposition, it is desired to quote from the opinion in that case the following (p. 439):

"Questions of power do not depend on the degree to "which it may be exercised. If it may be exercised at "all, it must be exercised at the will of those in whose "hands it is placed. If the tax may be levied in this "form by a state, it may be levied to an extent which will "defeat the revenue by impost, so far as it is drawn "from importations into the particular state. We are "told that such wild and irrational abuse of power is not "to be apprehended, and is not to be taken into view, "when discussing its existence. All power may be "abused; and if the fear of its abuse is to constitute an "argument against its existence, it might be urged "against the existence of that which is universally ac- "knowledged, and which is indispensable to the general "safety. The states will never be so mad as to destroy "their own commerce, or even to lessen it."

It is possible that Mr. Chief Justice Marshall was too sanguine in his assertion contained in last sentence of the passage just quoted. That madness might overtake a nation was apparently in the minds of the delegates to the constitutional convention, for the excitement which was then precipitating the French Revolution was having its contagious effect through the whole world. It is not an imposition upon credulity to consider that the existing state of affairs in France at that time inspired the clause of the constitution which required an equality of taxation.

A question of power that involves the making of a classification does sometimes depend upon the degree to which it may be exercised. Certainly this is true if making distinctions and exemptions can be regarded as

the making of classifications. It may be conceded that Congress has power to make such exemptions from a tax, as will relieve the government from the burden of a greater expense in the collection of the tax than the amount of the tax itself, without admitting or conceding the right of the government to classify estates paying taxes, according to the amount of those estates.

In connection with this consideration, the words used by Mr. Justice Peckham in *Nicol* v. *Ames* (173 U. S. 521) are not inapplicable:

"The question always is, when a classification is "made, whether there is any reasonable ground for it, "or whether it is only and simply arbitrary, based upon "no real distinction and entirely unnatural. *Gulf, Col-"orado, etc., Railway* v. *Ellis*, 165 U. S. 150-155; *Ma-"goun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, "294. If the classification be proper and legal, then "there is the requisite uniformity in that respect."

The making of classes dependent for their existence solely upon difference in amount of possessions is utterly abhorrent to all the principles which underlie the constitution. Such are the classes created by the law in question. The classification *"is only and simply arbitrary, "based upon no real distinction and entirely unnatural."*

TAXATION OF GOVERNMENT BONDS.

In his additional brief, the learned Solicitor General says this:

"The government of the United States has never

"agreed, so far as I know, not to tax property invested
"in its own bonds. It has expressly prohibited the taxa-
"tion of its bonds by any state or municipality or local
"authority."

It is true that there has never been an act of Congress, which says in so many words, that the government of the United States will not impose a tax upon its promises to pay. It is also true that it has expressly prohibited the taxation of its bonds by any state or municipality or local authority. The very fact that it has imposed a prohibition upon states, municipalities and local authorities, against the taxation of the bonds of the government, seems to furnish a guarantee that the bonds shall be free from all taxation whatever. The government says that it will pay one hundred cents on the dollar, and in order to make its obligation the more secure, it says that this promise shall not be subject to taxation by states or municipalities. It was not necessary that it should say that its promises should not be subject to taxation by itself.

It has agreed to pay in full. Its agreement will not be kept, if, under pretence of taxation, it deducts any thing from the amount which it has agreed to pay.

No case has come before this court, it is believed, in which there has been raised the question of the power of the government to impose a tax upon its own promises to pay. It does not require any great effort to learn why this question has never before been presented to this court. It was never until there was a session of the Fifty-fifth Congress, that a policy of repudiation had so

far obtained possession of the national Legislature, that it was deemed possible that the promises of the government could be repudiated under the pretext of taxation. Never before the present law has there been any similar law to invite the judgmet of this court.

The mere fact, however, that a law is novel, does not relieve the court from an examination of its terms, to determine whether it is within the constitutional powers of the law-making body of the government.

There may have been many cases that have been before this court, and before the highest courts of the different states, where the question has been raised of the power of a state or of a municipality, to tax the bonds or obligations issued by itself.

The learned Solicitor-General has taken pains in his additional brief, to call attention to one of these cases. It is the case of Murray v. Charleston (96 U. S. 432). How anything that is said in this case can aid him in maintaining his position, it is difficult to conceive. That there is much in the case that is worthy of consideration as bearing upon the present case, is evident. The attention of the court is respectfully called to the following rather lengthy quotation from the opinion of Mr. Justice Strong (p. 443):

"We come, then, to the question whether the ordi-
"nances decided by the court to be valid did impair the
"obligation of the city's contract with the plaintiff. The
"solution of this question depends upon a correct under-
"standing of what that obligation was. By the certifi-
"cates of stock, or city loan, held by the plaintiff, the city

"assumed to pay to him the sum mentioned in them,
"and to pay six per cent. interest in quarterly payments.
"The obligation undertaken, therefore, was both to pay
"the interest at the rate specified, and to pay it to the
"plaintiff. Such was the contract, and such was the
"whole contract. It contained no reservation or restric-
"tion of the duty described. But the city ordinances, if
"they can have any force, change both the form and ef-
"fect of the undertaking. They are the language of the
"promisor. In substance they say to the creditor:
" 'True, our assumption was to pay to you quarterly a
" 'sum of money equal to six per cent. per annum on the
" 'debt we owe you. Such was our express engagement.
" 'But we now lessen our obligation. Instead of paying
" 'all the interest to you, we retain a part for ourselves,
" 'and substitute the part retained for a part of what we
" 'expressly promised you.' Thus applying the ordi-
"nances to the contract, it becomes a very different thing
"from what it was when it was made; and the change is
"effected by legislation, by ordinances of the city, en-
"acted under the asserted authority of laws passed by
"the legislature. That by such legislation the obligation
"of the contract is impaired is manifest enough, unless
"it can be held there was some implied reservation of a
"right in the creditor to change its terms, a right re-
"served when the contract was made,—unless some
"power was withheld, not expressed or disclosed, but
"which entered into and limited the express undertak-
"ing. But how that can be,—how an express contract
"can contain an implication, or consist with a reserva-
"tion directly contrary to the words of the instrument,—
"has never yet been discovered.

"It has been strenuously argued on behalf of the de-
"fendant that the state of South Carolina and the city
"council of Charleston possessed the power of taxation

"when the contracts were made, that by the contracts the "city did not surrender this power, that, therefore, the "contracts were subject to its possible exercise, and that "the city ordinances were only an exertion of it. We "are told the power of a state to impose taxes upon sub- "jects within its jurisdiction is unlimited (with some "few exceptions), and that it extends to everything that "exists by its authority or is introduced by its permis- "sion. Hence it is inferred that the contracts of the city "of Charleston were made with reference to this power, "and in subordination to it.

"All this may be admitted, but it does not meet the "case of the defendant. We do not question the exist- "ence of a state power to levy taxes as claimed, nor the "subordination of contracts to it, so far as it is unre- "strained by constitutional limitation. But the power "is not without limits, and one of its limitations is found "in the clause of the Federal constitutional, that no state "shall pass a law impairing the obligation of contracts. "A change of the expressed stipulations of a contract, or "a relief of a debtor from strict and literal compliance "with its requirements, can no more be effected by an "exertion of the taxing power than it can be by the ex- "ertion of any other power of a state legislature. The "constitutional provision against impairing contract "obligations is a limitation upon the taxing power, as "well as upon all legislation, whatever form it may as- "sume. Indeed, attempted state taxation is the mode "most frequently adopted to affect contracts contrary to "the constitutional inhibition. It most frequently calls "for the exercise of our supervisory power. It may, "then, safely be affirmed that no state, by virtue of its "taxing power, can say to a debtor, 'You need not pay " 'to your creditor all of what you have promised to him. " 'You may satisfy your duty to him by retaining a part

" 'for yourself, or for some municipality, or for the state
" 'treasury.' Much less can a city say: 'We will tax
" 'our debt to you, and in virtue of the tax withhold a
" 'part for our own use.'

"What, then, is meant by the doctrine that contracts "are made with reference to the taxing power resident "in the state, and in subordination to it? Is it meant "that when a person lends money to a state, or to a mu- "nicipal division of the state having the power of taxa- "tion, there is in the contract *a tacit reservation of a "right in the debtor to raise contributions out of the "money promised to be paid before payment? That "cannot be,* because if it could, the contract (in the lan- "guage of Alexander Hamilton) would 'involve two con-
" 'tradictory things: an obligation to do, and a right not
" 'to do; an obligation to pay a certain sum, and the
" 'right to retain it in the shape of a tax. It is against
" 'the rules, both of law and of reason, to admit by im-
" 'plication in the construction of a contract a principle
" 'which goes in destruction of it.' The truth is, states "and cities, when they borrow money and contract to re- "pay it with interest, are not acting as sovereignties. "They come down to the level of ordinary individuals. "Their contracts have the same meaning as that of simi- "lar contracts between private persons. *Hence, instead "of there being in the undertaking of a state or city to "pay, a reservation of a sovereign right to withhold pay- "ment, the contract should be regarded as an assurance "that such a right will not be exercised. A promise to "pay, with a reserved* RIGHT TO DENY OR CHANGE THE "EFFECT OF THE PROMISE, IS AN ABSURDITY."

The position taken by the government, that this is not a tax upon the bonds themselves, but upon the privilege

of transmitting the bonds, would seem to be an evasion of the true issue.

In *Nicols* v. *Ames* (173 U. S. 521), this court substantially said, *per* Mr. Justice Peckham, that a tax upon every sale made in any place, is really and practically upon property. If this means anything, it means that a tax upon ordinary sales of property is a tax upon the property itself. How a transfer of property, by transmission of title, differs from a transfer of property upon a sale, is left for the counsel for the government to explain. If the government may not tax its bonds directly, it ought not to be permitted to tax the negotiable features of those bonds. It ought not to impose a tax upon the transmission of the bonds by will, while it may not impose such a tax when the transmission if by bill of sale.

No line of reasoning can furnish an escape from the argument, that a tax upon a sale, transfer, or transmission of the bonds, is a tax upon the bonds themselves. Therefore, the question reverts from a tax upon the privilege of transmitting the bonds, to the question of a tax upon the bonds themselves.

The decision of the Court of Appeals of the state of New York, in regard to what were formerly known as "quarter sales" (*DePeyster* v. *Michael*, 6 N. Y. 467), while not by any means parallel with the present case, furnishes analogies which are worth consideration.

It seems that in making perpetual leases of lands in the state of New York, one Van Rensselaer reserved to himself an equal one-fourth part of all purchase prices

that might be paid upon sales of the lands in question, forever. The Court of Appeals of the state of New York held this reservation to be void, as being in restraint of alienation. The position of the court was that the condition was repugnant to the grant.

In this case, the government has promised to pay. It is utterly repugnant to that promise, that the government should reserve to itself the right to retract its promise, in part, or in whole.

The decisions in this court in the *Virginia Coupon Cases* seem to cover all the ground that is necessary to be covered by decision, while the special point to be decided is left without exact precedent.

In *Hartman* v. *Greenhow* (102 U. S. 679), the court, *per* Mr. Justice Field, uses this language:

"A contract was thus consummated between the state "and the holders of the new bonds, and the holders of "the coupons, from the obligation of which she could "not, without their consent, release herself by any sub- "sequent legislation. She thus bound herself, not only "to pay the bonds when they became due, but to receive "the interest coupons from the bearer at and after matur- "ity, to their full amount, for any taxes or dues by him "to the state. This receivability of the coupons for such "taxes and dues was written on their face, and accom- "panied them into whatever hands they passed. It con- "stituted their chief value, and was the main considera- "tion offered to the holders of the old bonds to surren- "der them and accept new bonds for two-thirds of their "amount.

"In *Woodruff* v. *Trapnall*, reported in 10th Howard,

"a provision in an act of Arkansas, similar to this one, "that the bills and notes of the Bank of the State of Ar- "kansas, the capital of which belonged to the state, "should 'be received in all payments of debts due to the " 'state of Arkansas,' was held to be a contract with the "holders of such notes which was binding on the state, "and that the subsequent repeal of the provision did not "affect the notes previously issued. 'The notes,' said "the court, 'are made payable to bearer; consequently " 'every *bona fide* holder has a right, under the twenty- " 'eighth section (the one making the notes receivable " 'for dues to the state), to pay the state any debt he may " 'owe it in the paper of the bank. It is a continuing " 'guaranty by the state that the notes shall be so re- " 'ceived. Such a contract would be binding on an in- " 'dividual, and is not the less so on the state.' 'And that " 'the legislature could not withdraw this obligation " 'from the notes in circulation at the time the guaranty " 'was repealed, is a position which can require no ar- " 'gument.' In *Furman* v. *Nichol,* reported in the 8th "Wallace, a similar provision in an act of Tennessee, "declaring that certain notes of the bank of that state "should be 'receivable' at the treasury of the state and "by tax-collectors and other public officers, 'in all pay- " 'ments for taxes and other moneys due the state,' was "held by this court unanimously to constitute a valid 'contract between the state and every person receiving a "note of the bank. An attempt was made in the case to "restrain the operation of the guaranty contained in the "provision to the person who received the note in the "course of his dealing with the bank, but the court said: " 'The guaranty is in no sense a personal one. It at- " 'taches to the note,—is part of it, as much so as if " 'written on the back of it; goes with the note every-

" 'where, and invites every one who has taxes to pay to
" 'take it.'

"Yet, notwithstanding the language of the act of "March 30, 1871, providing that the interest coupons "of the new bonds should 'be receivable at and after ma-
" 'turity for all taxes, debts, dues, and demands due the
" 'state,' and this was so expressed upon their face, the "Legislature of Virginia, less than one year after after-"wards (on the 7th of March, 1872), passed an act de-"claring that thereafter it should 'not be lawful for the
" 'officers charged with the collection of taxes or other
" 'demands of the state' then due or which should there-"after become due, 'to receive in payment thereof any-
" 'thing else than gold or silver coin, United States
" 'treasury notes, or notes of the national banks of the
" 'United States.' This act, as seen on its face, is in di-"rect conflict with the pledge of the state of the previous "year, and with the decisions of this court to which we "have referred. Its validity, as might have been ex-"pected, was soon attacked in the courts as impairing the "obligation of the contract contained in the Funding "Act, and came before the Supreme Court of Appeals of "the state for consideration in *Antoni* v. *Wright,* at its "November Term of 1872. The subject was there most "elaborately and learnedly treated. The cases above "were cited by the court; and the provision of the Fund-"ing Act was shown, by reasoning perfectly conclusive, "to be a contract founded upon valuable considerations "and binding upon the state. And as to the objection "that such legislation might, and probably would, result "in crippling the power and resources of the state in "time of war or other great calamity, the court said, that "legislation cannot well be adapted in advance to ex-"traordinary and exceptional cases; that such cases will "occur at all times with all nations, and must be pro-

"vided for by the wisdom and prudence of the govern-
"ment for the time being. *'At such a time, however,'*
"said the court, in words full of wisdom, 'the honored
" 'name and high credit secured to a state by unbroken
" 'faith, even in adversity, will, apart from all other con-
" 'siderations, be worth more to her in dollars—incal-
" 'culably more—than the comparatively insignificant
" 'amount of the interest on a portion of the public debt
" 'enjoyed by breach of contract.' The court thus ex-
"pressed a great truth, which all just men appreciate,
"that there is no wealth or power equal to that which
"ultimately comes to a state when in all her engage-
"ments she keeps her faith unbroken."

Further consideration of these cases is found in *Antoni* v. *Greenhow* (107 U. S. 769); *Virginia Coupon Cases* (114 U. S. 269); *McGahey* v. *Virginia* (135 U. S. 662).

If it be claimed that all these decisions thus referred to, are made to rest upon the narrow foundation that is found in the clause of the constitution which provides that a state shall not pass a law impairing the obligation of contracts, while there is no such prohibition placed upon Congress, this court ought to consider that there are some basic principles which underlie the letter of the constitution.

It is true that there have been decisions by this court, that the Congress of the United States is not prohibited from making such enactments as will impair the obligation of contracts. It is, however, true, that Congress has never before undertaken to make an enactment which invades the sacredness of the promises of the gov-

ernment itself. The right of the Congress to pass a law, which will relieve the government from the payment of the full amount of its bonds, is absolutely inconsistent with the burden imposed upon the government to keep faith with its creditors, and is the assertion of a right, the establishment of which will be absolutely subversive of the credit of the government itself.

In connection with this, the attention of the court is respectfully asked to a reperusal of the last few sentences above quoted from the opinion of Mr. Justice Field, in the case of *Hartman* v. *Greenhow*.

At the present time, and to the present amount, taxation of these bonds may be a matter of little importance. The recognition, however, of the possession by the Congress of the power here claimed, is a recognition of the possession, by the government, of weapons which may be lawfully used for the destruction of the credit of the country, and their use for the destruction of the credit of the country may involve the destruction of the government itself.

This court has denied to states and municipalities the power to impose a tax upon its own promises to pay. Aside from such arguments as come from the strict enforcement of the letter of the constitution, with reference to the impairment of the obligation of contracts, there is no argument which can be advanced to uphold the decisions of the courts in such cases, that are not pertinent to the case at bar. Reason and justice both demand that the government shall keep to the utmost extent and to the last cent its promises to pay, and shall

withhold nothing from its just creditors, either under pretence of taxation, or under the open assertion of an absolute right of repudiation.

CORRECTION.

In point "VIII" of the additional brief of the United States, the Solicitor General has called attention to a citation upon Mr. Patterson's former brief, of a ruling of the Treasury Department made December 23, 1898. It appears that lately, and since the publication of the volume from which this ruling was quoted, the Treasury Department has restricted that ruling, and reversed the conclusions therein contained. The court, therefore, will not regard any argument based upon the ruling first referred to.

ERRATUM.

On page 58, line 22, of the brief for plaintiffs in error, the word "repudiated" should be "represented."

CHARLES E. PATTERSON,
Of Counsel.

Further Supplemental Brief on Behalf of the Plaintiffs in Error.

CHARLES E. PATTERSON,
Of Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1899.

GEORGE T. MURDOCK, as executor, etc., of Jane H. Sherman, deceased, *Plaintiff in Error, against* JOHN G. WARD, Collector etc., *Defendant in Error.*	No. 458
GEORGE D. SHERMAN, *Plaintiff in Error, against* THE UNITED STATES, *Defendant in Error.*	No. 459.

Further Supplemental Brief on Behalf of the Plaintiffs in Error.

The question of the taxation of government bonds, in so far as it is involved in these cases, has been discussed, up to the present time, upon the assumption, that there is no statutory enactment of Congress exempting the bonds of the United States from taxation by the United States itself.

In his additional brief for the United States Collectors, the learned Solicitor General used these words,

which have been heretofore quoted:

"The government of the United States has never "agreed, so far as I know, not to tax property invested "in its own bonds. It has expressly prohibited the taxa- "tion of its bonds by any state or municipality or local "authority."

Counsel for the plaintiffs in error followed this position of the government by saying:

"It is true that there has never been an act of Con- "gress, which says in so many words, that the govern- "ment of the United States will not impose a tax upon "its promises to pay."

In all this I have overlooked, and I presume Mr. Richards has overlooked, a line of legislation, to which my attention has been called since it was supposed the case was finally submitted for the consideration of the Court.

Counsel for the plaintiffs in error took the law from the Revised Statutes, and there found section 3701 in these words:

"All stocks, bonds, treasury notes, and other obliga- "tions of the United States, shall be exempt from taxa- "tion by or under state or municipal or local authority."

An examination of the Revised Statutes did not bring to light any further exemption from taxation than is provided for in this section.

It appears, however, that in 1870, there was passed "An Act to authorize the refunding of the national "debt," the first section of which is as follows:

"That the Secretary of the Treasury is hereby author- "ized to issue, in a sum or sums not exceeding in the ag- "gregate two hundred million dollars, coupon or regis-

"tered bonds of the United States, in such form as he "may prescribe, and of denominations of fifty dollars, or "some multiple of that sum, redeemable in coin of the "present standard value, at the pleasure of the United "States, after ten years from the date of their issue, and "bearing interest, payable semi-annually in such coin, "at the rate of five per cent. per annum; also a sum or "sums not exceeding in the aggregate three hundred mil- "lion dollars of like bonds, the same in all respects, but "payable at the pleasure of the United States, after fif- "teen years from the date of their issue, and bearing in- "terest at the rate of four and a half per cent. per "annum; also a sum or sums not exceeding in the aggre- "gate one thousand million dollars of like bonds, the "same in all respects, but payable at the pleasure of the "United States, after thirty years from the date of their "issue, and bearing interest at the rate of four per cent. "per annum; all of which said several classes of bonds "and the interest thereon *shall be exempt from the pay- "ment of all taxes or duties of the United States,* as well "as from taxation in any form by or under state, munici- "pal, or local authority; and the said bonds shall have "set forth and expressed upon their face the above-speci- "fied conditions, and shall, with their coupons, be made "payable at the treasury of the United States. But noth- "ing in this act, or in any other law now in force, shall "be construed to authorize any increase whatever of the "bonded debt of the United States."

Here is a clear and unmistakable provision, that the bonds issued under the provisions of this act, shall be exempt from payment of all taxes or duties of the United States. It is also a matter of legislation and history, of which this Court must take cognizance, that there are no bonds of the United States outstanding (unless lost or mislaid, and fully provided for), which were issued before this refunding act passed the Congress.

Therefore, this provision of this Chapter 256 of the Laws of 1870, is a provision controlling all government bonds, unless such as may be provided for in later legislation, and it makes them "*exempt from the payment of "all taxes or duties of the United States.*"

Of course, a very pertinent query will be presented, as to whether or not this provision of the refunding act, with reference to the exemption of bonds from the payment of taxes or duties of the United States, was repealed when the Revised Statutes went into force, which were supposed to embody substantially all the general laws of the government.

Title LXXIV contains the repealing provisions of the Revised Statutes. Section 5596 is as follows:

"Sec. 5596. All acts of Congress passed prior to said "first day of December, one thousand eight hundred "seventy-three, any portion of which is embraced in any "section of said revision, are hereby repealed, and the "section applicable thereto shall be in force in lieu "thereof; all parts of such acts not contained in such re- "vision, having been repealed or superseded by subse- "quent acts, or not being general and permanent in their "nature: *Provided*, that the incorporation into said re- "vision of any general and permanent provision, taken "from an act making appropriations, or from an act con- "taining other provisions of a private, local or tempor- "ary character, shall not repeal, or in any way affect any "appropriation, or any provision of a private, local or "temporary character, contained in any of said acts, but "the same shall remain in force; and all acts of Congress "passed prior to said last named day, no part of which "are embraced in said revision, shall not be affected or "changed by its enactment."

If it be claimed that this operates to repeal Chapter

256 of the Laws of 1870, it is answered thereto as follows:

First.—The language of the repealing statute is not broad enough to call upon the Court to construe the section in question as a repeal of the refunding act.

Second.—In 1875, after the Revised Statutes had gone into effect, Congress recognized Chapter 256 of the Laws of 1870, as being still in force. In Chapter 15 of the Second Session of the Forty-third Congress, approved January 14, 1875, and being "An Act to provide "for the resumption of specie payments," there is a provision that the Secretary of the Treasury be authorized to sell and dispose of:—

"Either of the descriptions of bonds of the United "States described in the Act of Congress approved July "fourteenth, eighteen hundred and seventy, entitled 'An "'Act to authorize the refunding of the national debt,' "WITH LIKE QUALITIES, PRIVILEGES AND EXEMPTIONS, *"to the extent necessary to carry this act into full effect."*

Thus Congress recognized the Act of 1870 as continuing to be in full force and effect, notwithstanding the repealing clause contained in the Revised Statutes.

Third.—All the government bonds issued since 1870 —and none are now outstanding (unless such as may be lost or mislaid) except those issued in or since 1870— have written upon them that they shall be exempt from the payment of taxes of the United States. Upon the face of each one of these bonds, and in accordance with the terms of the act, there is a stipulation that:

"The principal and interest are exempt from the "payment of all taxes or duties of the United States, as "well as from taxation in any form, by or under State, "municipal or local authority."

Fourth.—By section 33 of the Act of June 13, 1898, which is the Act now the subject of discussion before this Court, there is authorized the issue of four hundred millions of dollars of new bonds, with provisions for exemption from taxation by the United States *in the exact words and language contained in Chapter 256 of the Laws of 1870.*

Assuming the Acts of 1870 and 1875 to be unrepealed (unless by the War Revenue Law of 1898), and if counsel be correct in the claim that all bonds described in the complaints herein must be regarded as issued under the provisions of those acts [Mrs. Sherman died September 30, 1898, folio 3 record in *Sherman* v. *United States*], the only questions, upon this point, left for the Court to determine, are, whether the Act of June 13, 1898, repeals the previous laws which exempted government bonds from taxation, and, if not, whether the tax in question is a tax upon the bonds themselves.

It will be assumed that the Act of June 13, 1898, was not intended to repeal the previous laws which exempted government bonds from taxation. This will leave as the only question for consideration,—Does the present law impose a tax upon the bonds of the government?

Taking this as the exclusive question, if the tax be upon the bonds themselves, it must be regarded as unconstitutional and void, irrespective of the particular statutes to which attention has been called. This position seems to be, almost, conceded by the government, but the claim is made that the subject of consideration is not a tax upon the bonds themselves, but a duty upon the privilege of transmitting them.

Of course, if the Court shall hold that a tax upon the

gold of the temple is not a tax upon the temple itself; and a tax upon the gift lying upon the altar is not a tax upon the altar itself; and a tax upon the privilege of owning property is not a tax upon the property itself; and if a tax upon the privilege of negotiating property is not a tax upon the property itself; and if a tax upon the privilege of selling property is not a tax upon the property itself; and if a tax upon the privilege of inheriting property is not a tax upon the property itself; and if a tax upon the privilege of transmitting property by will is not a tax upon the property itself; and if a tax upon the privilege of dying intestate without transmitting property, when the state assumes the burden of transmitting it, be not a tax upon the property, the plaintiffs in error *may be* all wrong.

It is, however, respectfully submitted, that the decisions of this Court, and of other Courts, do not permit the government to take the position that it may impose a tax upon incidents to property, when it is prohibited from imposing the tax upon the property itself.

This question has been fully discussed in the various briefs that have already been filed with the Court upon the argument of the cause. At the same time, it seems important, in considering the statutes now referred to, that the attention of the Court should be called to a few decisions that have been heretofore cited.

In *Brown* v. *State of Maryland* (12 Wheat. 419, 444), the Court said:

"All must perceive that a tax on the sale of an article, "imported only for sale, is a tax on the article itself."

If a tax upon the sale be a tax upon the article itself,

for like reasons it is claimed that a tax upon *any* transfer is a tax upon the article itself, whether the transfer be by bill of sale, or under the inheritance tax laws of any state or territory.

Upon the rehearing of the *Income Tax Cases, Pollock* v. *Farmers' Loan & Trust Company* (158 U. S. 601, 691), Mr. Justice Brown said this:

"I regard the doctrine as entirely well settled in this "Court that *a tax upon an incident to a prohibited thing "is a tax upon the thing itself,* and if there be a total "want of power to tax the thing, *there is an equal want "of power to tax the incident"* (citing cases).

This was in a dissenting opinion, but upon this point there was no dissent.

In the same cases, *Pollock* v. *Farmers' Loan & Trust Co.* (157 U. S. 429), this Court, by Mr. Chief Justice Fuller, uses this language (p. 581):

"If it be true that by varying the form the substance "may be changed, it is not easy to see that anything "would remain of the limitations of the constitution, or "of the rule of taxation and representation, so carefully "recognized and guarded in favor of the citizens of each "state. But constitutional provisions cannot be thus "evaded. It is the substance and not the form which "controls, as has indeed been established by repeated "decisions of this Court. Thus in *Brown* v. *Maryland,* "12 Wheat. 419, 444, it was held that the tax on the oc- "cupation of an importer was the same as a tax on im- "ports and therefore void. And Chief Justice Marshall "said: 'It is impossible to conceal from ourselves that " 'this is varying the form, without varying the sub- " 'stance. It is treating a prohibition which is general, " 'as if it were confined to a particular mode of doing " 'the forbidden thing. All must perceive, that a tax on

" 'the sale of an article, imported only for sale, is a tax
" 'on the article itself.' "

Indeed, it would seem as if the decision of this Court in the *Income Tax Cases*, is sufficiently decisive of the claim that such a tax as is sought to be here imposed, is a tax upon the property itself, and if that property consists of government bonds, it comes within the prohibition of the statutes which constitute the agreement upon the part of the United States, that such bonds shall be exempted from taxation upon the part of the government itself.

Weston v. City of Charleston, 2 Pet. 460.
Bank of Commerce v. New York City, 2 Black 628.
Bank Tax Case, 2 Wall 200.
Case of The State Freight Tax, 15 Wall 232.
Cook v. Pennsylvania, 97 U. S. 562-572.

The War Revenue Law, being the Act of June 13, 1898, Sections 29 and 30 of which have been in these cases under consideration, contains express provision, in Section 33, for the issuing of four hundred millions of dollars of bonds of the United States, which "*shall be "exempt from all taxes or duties of the United States, "as well as from taxation in any form, by or under state, "municipal or local authority.*"

The words used in this section are the identical words that are used in the above cited Act of 1870. Being made part of the statute which provides for the imposition of the inheritance tax, and being in a section of the statute later than the sections which provide for the imposition of that tax, it seems to be beyond question that Congress intended that the imposition of this inheritance tax, should not be regarded by any court as inconsistent

with an exemption from taxation of the obligations of the government. But the Court must recognize that such inconsistency will arise, if the tax be regarded as imposed upon the privilege of transmitting government bonds. Therefore, it must logically follow, that it was the intent of the Congress that the transmission of government bonds, or their inheritance, should be exempt from all taxes and duties of the United States.

In this connection, it is worthy of note, that the word *"taxes"* is supplemented by the word *"duties,"* evincing an intention upon the part of the Congress to relieve such bonds, not only from direct taxes, but from such indirect taxes as are included under the designation in the constitution of "duties, imposts and excises."

It is not intended here to repeat the arguments that have already been addressed to the Court, but to call attention to the statutes that have been enumerated above, so that in its decision, the Court will not reach its conclusion, without having considered, at least, all the statutes that bear upon the question pressed upon the attention of the Court.

CHARLES E. PATTERSON,
Of Counsel.

No. 458 & 459.

Brf. of Southmayd & Rowe - Ey Cause

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

Filed Jan 15, 1900.

No. 458.

GEORGE T. MURDOCK, AS EXECUTOR, &C., OF JANE H. SHERMAN, DECEASED,

Plaintiff in Error,

vs.

JOHN G. WARD, AS COLLECTOR, &C.,

Defendant in Error.

No. 459.

GEORGE D. SHERMAN,

Plaintiff in Error,

vs.

THE UNITED STATES,

Defendant in Error.

BRIEF SUBMITTED BY LEAVE OF COURT, ON BEHALF OF HOLDERS OF UNITED STATES BONDS.

EVARTS, CHOATE & BEAMAN,
Attorneys for CHARLES F. SOUTHMAYD AND OTHERS,
Holders of United States Bonds.

CHS. F. SOUTHMAYD,
In Person.
WILLIAM V. ROWE,
Of Counsel.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1899.

GEORGE T. MURDOCK, as Executor, &c., of Jane H. Sherman, deceased, *Plaintiff in Error*, *vs.* JOHN G. WARD, as Collector, &c., *Defendant in Error.*	No. 458.
GEORGE D. SHERMAN, *Plaintiff in Error*, *vs.* THE UNITED STATES, *Defendant in Error.*	No. 459.

BRIEF SUBMITTED, BY LEAVE OF COURT, ON BEHALF OF HOLDERS OF UNITED STATES BONDS.

Intervening in this case—in the argument merely—by permission of the Court, on behalf of holders of United States bonds, for their interest in the question under adjudication, we confine this brief to a discussion of the terms, nature and effect of

the exemption from taxation by the United States, upon or in respect of the United States bonds now outstanding, which was created by means of the *express provisions of the statutes* under which such bonds were issued, and the declarations in that behalf inserted on the face of the bonds by the officials of the Government, in pursuance of the mandate of the statutes; disclaiming any intention to enter upon, review or interfere with, any of the discussions heretofore had, by or as between the direct parties to the litigation, in relation to the claim of such exemption, upon any other ground or basis than the express provisions and action above referred to, unless or except in so far as, if at all, anything in such previous discussion by or between the parties may bear prejudicially upon our claim of exemption by reason of these express provisions and this action above referred to.

While our views upon this subject are the result of mature reflection, the *method* of their expression in, and the *form* of, this brief, owing to the extreme haste required in its preparation—which will be readily understood in view of the short time allowed for filing—are extremely unsatisfactory to us. If the time had been longer, the brief would have been shorter. Under the circumstances, therefore, we must request the indulgent consideration of the Court, especially as these intervenors have had no opportunity for oral argument, although their interests far exceed those of the actual parties to the record.

I.

As to the express exemption of these bonds from "all" Federal taxation—the nature and scope of that exemption, and the rules of construction to be applied thereto.

We assume that the Court will take judicial notice of the fact (See letter of *Secretary of Treasury*, in *Appendix* to this Brief) that all the United States

bonds, now outstanding and running to maturity, have been issued under one or another of the three following mentioned acts of Congress, viz., the Act of July 14, 1870, commonly called the Refunding Act (16 Sts. at Large, 272), the Act of January 14, 1875, commonly called the Resumption Act (18 Sts. at Large, 296), and the Act of June 13, 1898, which is frequently called the War Revenue Act (30 Sts. at Large, 448, 467, § 33), though perhaps not quite accurately so, inasmuch as it makes provision for a new loan as well as for additional taxation.

In the *Appendix* to this brief is contained a statement, based upon statistics recently obtained by us from the *Treasury Department*, showing the *total issues*, the *amounts of the bonds of the respective issues outstanding* on December 31, 1899, which amounts cannot well have changed since then to an extent large enough to be material with reference to the present purposes, and also containing *copies of the specimen forms of these bonds of the several issues*, to which we have added the form of the 1898 bonds, to some of which forms of bonds we shall have occasion to refer hereinafter in more particular detail.

From this statement it appears that the outstanding bonds consist of—

1. $545,366,550 of the four per cent. thirty year bonds issued under the Refunding Act of July 14, 1870, being part of the original issue of seven hundred and forty millions of such bonds issued under that act, the residue of such issue having been, we suppose, taken up by the Government, by purchase for the sinking fund or otherwise. These $545,366,550 of bonds are what are commonly called the United States four per cent. bonds of 1907.

2. $25,364,500 extended two per cent. bonds, being part of an original issue under the Refunding Act of 1870 of two hundred and fifty millions of four and a half per cent. fifteen-year bonds, upon or after the

maturity of which the time of payment was, by some arrangement between the holders and the Government, extended, with the rate of interest on them reduced to two per cent., and so as to leave the principal payable at the option of the Government at some indefinite future period.

This makes in all upwards of $570,000,000 of now outstanding bonds issued under the Refunding Act of July 14, 1870.

3. $95,009,700 of the five per cent. ten-year bonds, due February 1, 1904, being part of the one hundred millions of such bonds issued under the Resumption Act of January 14, 1875. These are the bonds commonly called United States five per cent. bonds of 1904.

4. $162,315,400 of the four per cent. bonds, due February 1, 1925, being all of such bonds issued under the same Resumption Act of 1875. These are the bonds commonly called United States 4 per cent. bonds of 1925.

This makes in all upward of $257,000,000 of now outstanding bonds issued under the Resumption Act of 1875.

5. $198,679,000 three per cent. ten-twenty bonds issued under the War Revenue Act of June 13, 1898, part of the four hundred millions of such bonds authorized by that act, part of which authority was not exercised because of the speedy ending of the war.

These are known as the United States three per cent. bonds of 1908–18, they being payable in twenty years, but redeemable at the Government's option after ten years.

The whole amount of the outstanding bonds of the United States appears to be, or rather to have been on December 31, 1899, a little over *one thousand and twenty-six millions of dollars*, and the small reduction since that date is not of consequence enough

to be worth considering with reference to the present question.

All these outstanding bonds contain on their face this statement, placed there under the mandate of the statute:

> "*The principal and interest are exempt from the payment of all taxes or duties of the United States, as well as* from taxation in any form by or under State, municipal or local authority."
>
> See copy of letter, &c., from the Treasury Department in the *Appendix* to this brief.

The Refunding Act of July 14, 1870, under which these outstanding bonds to the amount of upwards of $570,000,000 were issued, contains, in its first section, the following provision, viz.:

> "That the Secretary of the Treasury is hereby authorized to issue, in a sum or sums not exceeding in the aggregate two hundred million dollars, coupon or registered bonds of the United States, in such form as he may prescribe, and of denominations of fifty dollars, or some multiple of that sum, redeemable in coin of the present standard value, at the pleasure of the United States, after ten years from the date of their issue, and bearing interest, payable semiannually in such coin, at the rate of five per cent. per annum; also a sum or sums not exceeding in the aggregate three hundred million dollars of like bonds, the same in all respects, but payable at the pleasure of the United States, after fifteen years from the date of their issue, and bearing interest at the rate of four and a half per cent. per annum; also a sum or sums not exceeding in the aggregate one thousand million dollars of like bonds, the same in all respects, but payable at the pleasure of the United States, after thirty years from the date of their issue, and bearing interest at the rate of four per cent. per annum; *all of which said several classes of bonds and the interest thereon shall be exempt from the*

> *payment of all taxes or duties of the United States, as well as* from taxation in any form by or under State, municipal or local authority; *and the said bonds shall have set forth and expressed upon their face the above specified conditions,* and shall, with their coupons, be made payable at the treasury of the United States. But nothing in this act, or in any other law now in force, shall be construed to authorize any increase whatever of the bonded debt of the United States."
>
> 16 Sts. at Large, 272.

The Resumption Act of January 14, 1875, the outstanding bonds under which amount to upwards of $257,000,000, provides as follows:

> "Sec. 3. * * * And to enable the Secretary of the Treasury to prepare and provide for the redemption in this act authorized or required, he is authorized to use any surplus revenues, from time to time, in the treasury not otherwise appropriated, and *to issue, sell, and dispose of, at not less than par, in coin, either of the descriptions of bonds of the United States described in the Act of Congress approved, July fourteenth, eighteen hundred and seventy, entitled 'An act to authorize the refunding of the national debt,' with like qualities, privileges and exemptions,* to the extent necessary to carry this act into full effect, and to use the proceeds thereof for the purposes aforesaid. And all provisions of law inconsistent with the provisions of this act are hereby repealed."
>
> 18 Sts. at Large, 296.

The War Revenue Act of 1898 does not in terms refer to the exemption provision in the Refunding Act of 1870, but it *contains an independent provision on the subject in substantially the same language* as that of the Refunding Act, viz.:

> "And the bonds herein authorized shall be *exempt from all taxes or duties of the United States, as well as* from taxation in any form by or under State, municipal or local authority."
>
> 30 Sts. at Large, 467, § 33.

This Act of 1898 differs, however, from the former acts in that it does not make it mandatory upon the officials that this exemption shall be declared upon the face of the bonds. Nevertheless, the Treasury Department (See letter in *Appendix*), as an executive act construing the statute, *has printed precisely the same contract of exemption on the face of these bonds as in the case of all other outstanding bonds.*

From the foregoing statement it will be perceived that the question at issue can appropriately be discussed and disposed of as to all the outstanding United States bonds, as if they had all been issued under the Refunding Act of 1870, there being no material difference between it and the subsequent acts so far as respects the nature and extent of the exemption.

We understand that some reference has been made to Section 3701 of the Revised Statutes, which *declares*, generally, the exemption (*it would exist independently thereof*) of all government obligations *from State, local and municipal taxation.* We may say, once and for all, that the provisions of the Revised Statutes have nothing whatsoever to do with this question under discussion, nor do they refer in any way thereto.

The statutes authorizing the outstanding bonds are *special acts, temporary in their nature,* passed for the *specific purpose* of authorizing and providing for these issues of bonds, to mature *within a limited number of years.* They are not laws in the ordinary sense, binding on all citizens in respect to rights, duties, or remedies, but are rather *special acts, conferring authority merely on the Secretary of the Treasury* to do the *specific* and *temporary* thing described, that is to say, *to borrow certain specified amounts* on the faith and credit of the United States, for the times, and on the terms, prescribed therein. They do not differ in form and effect from a statute authorizing the borrowing of

money to build a fort or a post office, and the issuance of bonds therefor.

The Revised Statutes of the United States, on the other hand, embrace only those statutes of the United States which are "*general and permanent* in their nature."

U. S. Rev. Stat., § 5595.

The latter have really little more bearing upon the statutes authorizing the issues of these bonds, and the bonds themselves, than has the Code Napoleon. These special and temporary authorizing statutes are complete in themselves, and contain all of the provisions of law applicable to the form and issue of the bonds.

The Resumption Act of 1875, *referring to the Refunding Act of* 1870, *as an existing statute*, was passed *long after the Revised Statutes*, and under both of those acts *the Treasury Department has, from year to year and day to day, for nearly a quarter of a century, been regularly issuing bonds with these clauses of exemption.*

Of course, it cannot be contended for a moment that, under these circumstances, the Revised Statutes in any respect repealed or affected the Refunding Act—which must have been thereby repealed as a whole, if at all—upon the continuous existence of which act, the larger part of the outstanding bonds are now absolutely dependent for their life and value. The Revision has no more to do with these statutes than it has with the supposed special act as to a post office or fort, to which we have referred.

Proceeding, then, with the discussion on the basis that all of the outstanding bonds are controlled by the same exemption as that found in the Refunding Act (and that is the fact), we think it will be convenient to introduce in this place a copy of the form of the bonds issued under the Refunding Act of 1870—the others are substantially like this—and we,

therefore, give it as follows (See Treasury Statement in *Appendix*):

"*Four per cent loan of 1907, consols.*

(Face of bond.)

1877 1907. M

FOUR PER CENT CONSOLS OF THE UNITED STATES.

A 4

Washington, July 1st, 1877.

Principal and interest payable in coin One M Thousand at the Treasury of the United States.

THE UNITED STATES OF AMERICA

Are indebted to.....*or assigns*, in the sum of One Thousand Dollars. This bond is issued in accordance with the provisions of an act of Congress entitled "An act to authorize the refunding of the National Debt, approved July 14, 1870," amended by an act approved January 20, 1871, and is redeemable at the pleasure of the United States after the first day of July, A. D. 1907, in coin of the standard value of the United States on said July 14, 1870, with interest, in such coin, from the day of the date hereof, at the rate of four per centum per annum, payable quarterly on the first day of October, January, April, and July in each year. *The principal and interest are exempt from the payment of all taxes or duties of the United States, as well as from taxation in any form by or under State, municipal, or local authority. Transferable on the books of this Office.*

Date of issue.....

Entered.....

Recorded.....

.....

Register of the Treasury.

Act of July 14th, 1870.

(Back of Bond.)

Act of July 14th, 1870. Amended January 20th, 1871.

Transfer (NO.....).

Original Date.... Original No.....

1000. FOUR PER CENT. CONSOLS. 1877–1907.

For value received, ...*assign to*..... the within registered bond of the United States, and hereby authorize *the transfer* thereof on the books of the Treasury Department.

Dated ....., 18..

State of....., County of....., Town of.....

Personally appeared before me the above named *assignor*, known or proved to me to be the.....payee of the within bond, and signed the above *transfer*, acknowledging the same to be his free act or deed.

Witness my hand, official designation, and seal.

.....

NOTE.—The execution and acknowledgment of the above assignment, when not made at the Treasury Department, must be before a U. S. judge, U. S. district attorney, clerk of a U. S. court, collector of customs, collector or assessor of internal revenue, U. S. Treasurer or Assistant Treasurer, or the president or cashier of a national bank, or, if in a foreign country, before a U. S. minister or consul. In all cases the officer must add his official designation, residence, and seal if he has one. When the *assignment* is made by a corporation, it must be named as the assignor: when by a guardian, *trustee, executor, administrator,* an officer of a corporation, *or anyone in a representative capacity,* proof of his authority to act must be produced to the officer before whom the *assignment* is made and must accompany the bond. *Assignors* must be identified as known and responsible persons to the satisfaction of the officer.

One Thousand."

Upon the foregoing statement, it is indisputable that the provision in question, so far as respects the taxing power of the United States, is an exemption, not merely from *direct* taxation, but from *all indirect* taxation as well.

Under the Constitution of the United States, the taxes which the Federal Government is authorized to impose are divided into two great classes, to be imposed upon entirely different bases, viz., direct taxes, to be laid under the rule of apportionment between the States in proportion to population, and indirect taxes, which must be imposed upon the basis of uniformity throughout the nation, which two bases are radically different in their application, inasmuch as direct taxation, by the rule of apportionment between the States according to population, necessarily precludes the uniformity throughout the nation, in respect of the burden upon individual tax payers, which is required for indirect taxation; so that no one tax can belong to *both* classes, direct and indirect.

By the Constitution "duties, imposts and excises" are unquestionably described as indirect taxes, being required to be laid by the rule of uniformity.

The general *grant of the taxing power* is to "levy and collect *taxes, duties, imposts and excises.*"

In the *same clause* is the provision for uniformity in respect of *duties, imposts and excises*, but there is *no provision in that section* in respect to the rule for imposing *other taxes*. Doubtless this was because the Constitution had *elsewhere* provided the rule of apportionment for direct taxes, and doubtless it was supposed that all taxes would fall within one or the other of the two classes, regulation of which had been thus provided for, the chief Federal taxation to be, however, *indirect*.

Pollock v. *Farmers' Loan & Trust Co.* (*Rehearing*), 158 U. S. at pp. 617–18, 621–22.

There has been, at times, more or less speculative discussion as to the possibility of the imposition of some tax which would not fall within either of the two great classes, but we think we may say with confidence that in the period of one hundred and ten years since the Constitution went into operation, no such imaginary possible tax, belonging to neither class, has been discovered and defined.

The exemption in question being, in the word first used in it—"*taxes*"—as broad as the word "*taxes*" used by the Constitution in its grant of the *taxing power*, would, under ordinary construction of language and according to natural and common understanding, be understood by investors to embrace exemption from all United States taxes whatsoever, whether direct or indirect, and so, we submit, it ought to be regarded in the construction of this act.

But the act and the bonds do not leave the matter to this alone. The declared exemption is from "*all* taxes or *duties*," and "duties" are indisputably in the class of *indirect* taxes. Indeed, the representatives of the Government are under the necessity of claiming that this is an indirect tax, inasmuch as, if a direct tax, it would indisputably be void, because not laid by the rule of apportionment.

The exemption in question, held out to investors whom the Government desired to attract, by way of inducement to them to make the investment, exhibits in its language an intent to create the exemption in broad, general and comprehensive terms.

Authorized Federal taxation being authoritatively divided into two great classes, and it being of course so understood by Congress, *a declared exemption from both the classes of tax* should be regarded as embracing, in the view of Congress, an exemption from *all Federal taxation whatsoever*.

In respect of taxation by the States, of course, varying from each other in respect of methods and classes of taxes, and subject to subsequent variation indefinitely, no such form or method of declaring the exemption could be used. And, consequently, in re-

spect of the States, the exemption was declared to be from taxation "*in any form*" by or under their authority.

Under the circumstances and in view of the manifest intention of the act to hold out this exemption from taxation by way of inducement to investors, we submit that there is no just ground to suppose or believe *otherwise than* that it was the intent of the act to make the exemption from Federal taxation *as broad, sweeping and comprehensive as the exemption from State taxation.*

So far as our researches have extended, the only case *in this Court* touching directly the question of United States legacy, succession or inheritance taxes is *Scholey* v. *Rew*, 23 Wall., 331—which case, we think, has been claimed, and by some regarded, as being extremely adverse to the side of this question which we are endeavoring to maintain. We think, on the contrary, that it is not adverse to us, but, when correctly understood, rather an authority in our favor.

That case arose under the succession and inheritance tax provision of the Act of 1864, as amended in 1866, and was dependent on the inherent powers of Congress in respect of taxation of such character, not qualified by any exceptions created or declared by itself. The tax was claimed by reason of the passing of property by will from a wife to her husband. The first material point of inquiry was whether the property was to be regarded, with reference to the tax claimed, as real estate or in legal effect as personal estate, it being real estate which had been purchased and paid for by Trustees with funds derived from personalty—the materialty of this point arising from the circumstances, that the United States taxing statute exempted personalty passing by will from wife to husband, but did not exempt real estate so passing. The decision was, that it was to be regarded as *real estate* for the purpose in question.

On that basis the tax was claimed to be invalid,

as being a direct tax, not imposed under the rule of apportionment, as the Constitution requires direct taxes to be. The *decision* was, that it was *not a direct tax, but an indirect tax* on the passing or transfer of the property in or by this particular manner or means, and that, the rule requiring apportionment not being applicable to indirect taxes, the tax was valid.

It is true that the Court in its opinion chose to call it an excise tax *or duty*, but it was quite immaterial for any practical purpose, what particular kind of indirect tax it was or shou'd be called. We think it clear that the Court *might with at least equal propriety have called it a "duty"* merely. *That was the name given to it by the Act of* 1864, and *that is the name given by Congress in the War Revenue Act of* 1898, the construction of which is here in question, to the taxes of this character, *viz.*, upon or in respect of legacies and distributive shares of personal property, which that act imposes, or purports to impose.

By reference to that portion of the act of 1898, Section 29, it will be seen that when first designating it by name, it calls it a "*duty or tax*"; then in prescribing certain rates, with reference to degrees of kindred, &c., &c., it says the "tax" shall be at such and such rates. Then it provides that all legacies on property passing from husband to wife shall be exempt from the "*tax or duty.*" And then, in the final clause graduating the tax with reference to amount of property, prescribing four different rates, it provides that where the amount or value shall exceed $25,000, but not exceed $100,000, the rates of "*duty or tax*" previously set forth shall be multiplied by one and a half, and *then* in fixing the final graduated rates, increasing progressively, with the increases in amount of property, it provides that *such rates of* "*duty*" (that word "duty" here standing alone, not coupled with the word tax or with any other word) shall be multiplied, by two, by two and a half, by three, respectively, and nowhere in

this act is the word "excise" used at all in relation to this subject-matter.

As there is found in all the acts under which the outstanding bonds of the United States were issued, and likewise on the face of the bonds, an express exemption from "duties" of the United States, it is necessary for our adversaries, in order to maintain their contention here, to establish, first, that the word "duties," as thus used in the declaration of exemption, does not embrace exemption from such taxation as the War Revenue Act of 1898 imposes upon legacies and distributive shares of personalty, and, secondly, that that act was *designed to and does*, in the merely *general language* which it uses, *without at all mentioning United States bonds*, impose such burthen of taxation upon or in respect of them, notwithstanding the exemption for which the Government has plighted its faith to the original lender of the money for which the bonds were issued *and to their successors in interest and "assigns,"* as holders of the bonds, thus repudiating the original loan.

It seems to us that this must be to our adversaries an extremely difficult and indeed impossible task, especially in view of the circumstance that the Act of 1898, which is claimed to have imposed this tax, expressly designates the tax which it imposes as a "*duty.*" But we must not forget that we have the judgment of the Court below (even though *pro forma*, in effect) against us, nor can we lose sight of the very great importance of the question, as well in principle as in respect of the great amount of money involved in the determination, having regard to its practical application, presently and *ultimately*, and we therefore proceed to the discussion much more elaborately than would seem to us to be demanded by any intrinsic difficulty in the case, or doubt as to what the decision should be.

The taxes imposed by our Government upon the importation of goods from abroad are now in common parlance, and perhaps ordinarily in statutes,

called duties—sometimes customs duties or customs —but unquestionably the general term "duties," is not and never has been *confined* to duties on *imports*. It embraces other taxes belonging to internal revenue.

Returning to this particular case or question, may we not justly say that any assumption that this particular exemption from "*all*" United States "*duties*" granted to the original lenders of money to the United States upon these bonds and to their successors in interest as bondholders, was designed or intended for the purpose of protecting such lenders or bondholders *as such*, from being subjected to the burthen of duties on *imports*, would be merely absurd? We do not imagine that any such proposition will be asserted by the representatives of the Government. If it should be, we think we might safely, without argument, leave the proposition to fall by its own weight.

We assume, therefore, that this exemption covers "*duties*" *of the Internal Revenue class*, and we take it to be quite clear (irrespective of the advantage in the argument which we derive from the circumstance that the tax here in question is *described as a* "DUTY" *in the very act which is claimed to have imposed it*, and which we deem quite sufficient for our purpose) that any internal revenue tax, which, if there were no contracted exemption, would fall as a burthen upon these bondholders, may from its nature be properly classed as a "duty" within the intent and meaning of the contracted exemption. If it may properly be called an excise, it is an *excise duty* or *duty of excise*.

The subject of "Duties, Imposts and Excises," as these words are used in the Constitution of the United States, in regard to their nature and extent respectively, and the lines of discrimination between them, so far as they clearly exist without running into each other, is, we think, one of some complexity and uncertainty, and we think it not inappropriate to state here some general views on the

subject which, we trust, may be found not substantially incorrect after the full scrutiny to which they are, of course, subject.

Proceeding thus to state such general views, we have to say:

The term "duties," as used in the Constitution, is a much larger and more comprehensive word than either of the words "imposts" and "excises" as used in that instrument, and is a general term, embracing, in fact, to a great extent, if not fully, both the more limited terms "imposts" and "excises."

The word "duties," as thus used, unquestionably embraces both taxes imposed upon importations from abroad and taxes for internal revenue.

The word "imposts" used in the Constitution is now seldom heard. It has almost if not entirely gone out of use. But at and about the time of the framing of the Constitution it was very much in vogue, and was then understood to refer mainly if not entirely to taxation on imports.

It is matter of history that in the interval between the close of the War of the Revolution and the framing of the Federal Constitution, there was an earnest and persistent, though not practically successful effort, on the part of the Continental Congress, to obtain from the States a grant of power to the Congress to lay taxes on imports, a power Congress did not at all possess, which power of taxation so sought was then commonly called "the impost."

For an account of this matter see McMaster's History of the People of the United States, Vol. 1, pp. 141 to 145-154-156-201-202-266-67-357-367-370.

And in the first article of the Constitution, near its close, we find the following provisions:

> "No *tax or duty* shall be laid on articles exported from any State.
>
> "No State shall without the consent of the Congress lay any *imposts or duties* on imports or exports except what may be absolutely necessary for executing its inspection laws.

> "No State shall without the consent of Congress lay any *duty on tonnage.*"

As showing that the term "duty," like the word "tax," is *generic, the former referring to all classes of indirect taxes*, Judge COOLEY's definitions are instructive. He says:

> "Thus, the word *duty* is sometimes used *in a general sense as synonymous with tax; but in common use it means an indirect tax*, imposed on the importation, exportation or consumption of goods. The term *impost*, also, in its general sense, signifies any tax, tribute or *duty;* but it is seldom applied to any but the *indirect taxes. Customs duties*, as the term is commonly used, are the *duties* levied upon imports and exports, while *excise duties* are *inland imposts*, levied upon articles of manufacture and sale, upon licenses to pursue certain trades or deal in certain commodities, upon special privileges, etc."
>
> Cooley on Taxation (2nd Ed.), 3.

As this Court has heretofore said, after quoting the foregoing definitions:

> "In the Constitution, the words '*duties, imposts and excises*' are put in *antithesis to direct taxes.*"
>
> *Pollock* v. *Farmers' Loan and Trust Co.* (*Rehearing*), 158 U. S., at p. 622.

In support of our statement that the word "duty" is a general term of large import, comprehending many more limited or special kinds of tax, we refer to the article entitled "Taxation" in the Encyclopœdia Britannica, containing in nearly forty pages an elaborate discussion of that subject under different headings, including the following, viz.: "*Excise duties*," "*Customs duties* or duties on the importation and exportation of commodities," "*Stamp and Legacy duties*," "*Duties on Successions* or on the *transfer* of property *from the dead to the living.*"

Although the word "impost" in this connection has thus practically gone out of use, and been superseded by the words "duties," or "customs," or "customs duties," used to its exclusion, instead of concurrently with it as formerly, the word "excise" has, in the period that has elapsed since the adoption of the Constitution, come to be used in common parlance, and to some extent in legal proceedings and acts, more extensively and with wider scope, and as applicable to more numerous subjects, than at the time of such adoption, but we think that in most, if not all, the instances of application of the term "excise" to new subjects, it has been rather concurrently with, than to the exclusion of, the old term "duties," in respect of such subjects.

We think that the popular idea or understanding in relation to excises originally and for a long time was, that they were taxes imposed upon or in respect of liquors or their production or sale or consumption, and that this idea still, to a considerable extent, prevails, and is acted on; but doubtless it is now a long time since this term "excise" came to be applied, at least for legal purposes and in legal proceedings, to and in respect of other subjects than liquor. And yet the memorable insurrection in Western Pennsylvania, which was so extensive and violent that it became necessary to call out a large military force to quell it, was consequent upon dissatisfaction with the taxing of whiskey by the United States under what was called the *excise* law, and in the State of New York we still apply that term "excise" to legal regulations and legal officials and their acts, relating to liquor.

We have now to make this observation, *viz.*—This act of 1898, which in the 29th section imposes the tax in question, provides in the 33d section for a *new loan* not exceeding $400,000,000, upon United States three per cent. bonds, and in that section makes the following declaration:

> "and the bonds herein authorized shall be *exempt from all taxes or duties of the United*

> *States*, as well as from taxation in any form by or under State, municipal or local authority."

We submit that it is entirely clear that the three per cent. bonds issued under this 33d section which, to the amount of $198,679,000, are now outstanding, are *clearly not subject to the tax or duty imposed by the 29th section.*

As to this point, the situation is, that the 29th section imposes this "tax or duty"—or the "duty" pure and simple—upon legacies or distributive shares of personalty passing by will or upon intestacy, according to the amount or value of the property so passing, *this burthen of taxation being thus imposed, upon property so passing, in general terms merely,* without any discrimination or specification, by way of either exclusion or inclusion or otherwise, in respect of the different kinds of property. The subsequent section creates *an exemption from this tax or duty in favor of certain specified property, viz., the United States bonds issued under such subsequent section,* which were liable so to pass, and altogether likely so to pass, to a great aggregate extent, upon the death of the owners.

If this exemption of particular property were contained in the same section which imposed the tax or duty upon property generally, it would seem to be too clear for dispute that the exemption effectually shielded the particular property from subjection to the tax or duty provided by the act for the ordinary and general mass of property. Surely, it can make no difference, for legal purposes or in legal effect, whether the general imposition of the tax and the special exemption of the particular property therefrom are contained in the same section or in different sections of the act, nor can it make any difference in legal effect, in this respect, that the exemption contained in this later section embraces within its scope and effect all other taxes or duties of the United States, as well as the tax or duty im-

posed upon property in general terms by the preceding section.

The operative exemption declared is from "*all*" taxes or duties of the United States, and certainly this is an adequate shield against the particular tax or duty before mentioned in this act, unless the general rule or principle, that the greater includes the less, is to be in this instance disregarded.

In this connection, it is to be borne in mind that it was needful that the Government should make the exemption of these three per cent. bonds from taxation as broad as it is, *in order to avoid placing them on a much less favorable basis in this respect than the other United States bonds then outstanding, all of which had such exemptions* from all Federal and State taxation, expressed in like language, and all of which exemptions of the outstanding bonds, prior to the three per cents., were contained in special clauses of exemption set forth in the particular acts under which such bonds were issued, and limited in express terms to the bonds issued under that particular statute. There is not, and never has been, any general act exempting United States bonds, *in general*, issued or to be issued, from taxation by the United States.

It may be assumed, as we think justly, that, by reason of the exemption of the three per cent. bonds issued under the Act of 1898 from liability for the tax or duty upon legacies and distributive shares of property, by force of the exemption clause contained in that Act, all the other then outstanding bonds of the United States, issued under former acts, have the like exemption from liability for the tax or duty imposed by the Act of 1898 upon legacies and distributive shares of *property generally*, inasmuch as all these other outstanding bonds have, in virtue of the law under which they were issued, the same exemption from *all* taxes and duties of the United States, expressed in language similar to the clause in the Act of 1898, exempting the three per cent. bonds issued under it from taxation.

We return now to the discussion of the more interesting and more ultimately important question, as to the right and power of the United States to impose taxes or duties, of the character of the tax or duty now in question here, upon or in respect of the outstanding United States bonds, which have, in virtue of the law of their issue and of the express terms of the bonds, such exemption from United States taxation as has been heretofore mentioned in detail.

We enter upon the discussion with reference primarily to the Refunding Act of July 14, 1870, as a basis for determining the question at issue, inasmuch as that is the pattern act, after which, so far as respects the terms of exemption, these other acts were framed —we believe in every instance in precisely the same language, or clearly to the same effect, as in the Act of 1870—and we assume that if we establish the exemption we claim as existing and applicable in respect of the bonds issued under the Act of 1870, there can be no ground for denying that all the other outstanding bonds have the like exemption.

Proceeding with the discussion upon this basis, we desire, in the first place, to call the attention of the Court to the circumstances under which, and the purposes for which, the bonds under the Act of July 14, 1870, were issued, and the exemption in respect thereof was declared and granted, and notified to whom it might concern —as matters affecting the general rules and principles upon which, and the spirit in which, that act, and especially the exemption clause of it, should properly be considered and construed—of which circumstances and purposes, we assume the Court will take judicial notice, they being of a public nature and matter of general public information, and in great part appearing by reference to, and consideration of, statutes and things public.

The scheme of this Act of July 14, 1870, was for the borrowing by the Government, upon the bonds authorized by it, of an aggregate amount of fifteen

hundred millions, not at all for the purpose of providing for new expenditures, but solely for the purpose of taking up, with the money thus borrowed, bonds of the United States then outstanding, it being an express provision of the act that the total amount of the Government bonded debt should not be increased by this new borrowing.

By this scheme, one thousand millions, or less, was designed to be borrowed upon thirty year bonds, bearing interest at the rate of four per cent., which was a rate of interest then unprecedently low for the bonds of this Government—the lowest rate of interest upon any of its bonds then outstanding being five per cent., while upon a very large amount of the then outstanding bonds the rate was six per cent. We are not able to say at this moment whether the Government had *ever* before this time been able to obtain loans at a less rate than five per cent, not having had time to investigate that matter thoroughly within the short time allowed to file this intervening brief, but we feel quite confident that, if there was any such borrowing at a lower rate than five per cent., it must have been very long before this refunding scheme of 1870.

Among the bonds designed to be taken up and practically replaced at a lower rate of interest, by means of the borrowing on the new bonds provided for by this act, were a very large amount of five-twenty bonds, so-called, bearing interest at the rate of six per cent., which were payable in twenty years, with the optional privilege to the Government of calling them in and paying them off at par at any time after five years, and a very large amount of ten-forty bonds, so called, bearing interest at the rate of five per cent., payable in forty years, with the optional privilege to the Government of calling them in and paying them off at par at any time after ten years.

The six per cent. bonds of 1880 and 1881, outstanding at the time of the passage of this refunding

act, were not accompanied by any optional right of paying them off before maturity.

Of course, the saving or gain to the Government, by practically substituting these four per cent. bonds for outstanding five per cent. bonds, would be at the rate of one per cent. per year, and in so far as there was such practical substitution of four per cents. for six per cents., the annual saving or gain, for the time the old bonds had to run, would be at a much higher rate. We need not enter into any close calculations on this subject. Suffice it to say, that a difference at the rate of one per cent. a year upon the seven hundred millions of new four per cents., between that low rate, and the rate of five per cent., which was the lowest rate borne by any of the bonds outstanding at the time of this refunding act, would be seven million dollars annually, amounting, in the thirty years the new four per cent. bonds had to run, to two hundred and ten millions.

It is too plain for dispute that the Government, while greatly desiring to attain this reduction of its annual interest charge, appreciated the difficulty of doing so, and felt the necessity of offering some new and substantial advantage to money lenders or investors in order to induce them to purchase at par the new bonds bearing this unprecedently low rate of interest, and that *this exemption from taxation was proffered by the Government as such inducement*—it being directed that it should be *set forth on the face of the bonds.*

This exemption was devised and established by the Government, of its own head and *merely for its own sake and for its own benefit and advantage*, it being intended to operate by way of inducement as above stated, and it was *not at all for the sake of, or as an act of favoritism to, the lenders or investors*, who might be thus induced to lend the money, or become takers or holders of the bonds, though, of course, it was intended that the bondholders, after they had been induced to invest in the bonds because and in consideration of the ad-

vantage proffered to them in and by this exemption, should be entitled to have and enjoy the benefit of such exemption.

And in order that this exemption, thus proffered, should have the effect, by way of inducement to lenders and investors, for which it was designed and created, it was carefully provided by the statute establishing the exemption, as we have seen, that it should be brought to the notice of investors and would-be investors by means of the *statement of it on the face of the bonds*, directed to be inserted by the statute, which purpose was accomplished, and the exemption thus actually brought to the knowledge of, and relied on, by the parties who became investors. And this was none the less so in those cases, in which the bonds were sold in large blocks or quantities to bankers or large dealers in such securities, who buy, not to hold for themselves as investors, but with intent to sell again, and whose willingness thus to buy, and the price they can afford to pay, are dependent upon their ability to find purchasers for actual investment, and the price obtainable from such investors.

As well in case of the large sales in blocks to bankers and dealers as in the case of employing such parties to sell directly as agents of the Government, in consideration of a commission paid to them, the position of such bankers and dealers is, practically, merely intermediary between the Government and the investor who buys for permanent holding, who is in real substance the original lender.

In the course of the execution of the Government's scheme for borrowing money upon these bonds at the low rate of four per cent. theretofore unprecedented, these bonds, bearing upon their face the Government's express declaration of exemption from both Federal and State taxation, in the very broad, general and comprehensive terms which were employed, were scattered broadcast over this

country and in Europe, and ultimately the scheme was made successful.

But it is manifest that this was an extremely difficult task, and that the Government understood it to be so, and perfectly understood that this assurance to the original bondholder and his successors in interest, against the burthen of any taxation, whether Federal or State, must be and was an essential part of the scheme for borrowing at this reduced rate, without which the scheme could not be accomplished.

For some years *before this scheme was devised, the Government*, assuming that it had the like power and right to tax its own bonds as to tax other property, *had proceeded, in exercise of such right, to levy and collect taxes upon the income of such bonds.*

By the Act of July 1, 1862 (12 Sts. at Large, 474), it imposed a tax upon the interest on United States bonds at one-half the rate of the tax imposed upon the income derived from other property, but by the Act of June 30, 1864 (13 Sts. at Large, 281 and 479), this discrimination in favor of the holders of United States bonds was abandoned, and the interest on them was taxed at the like rates as other income.

In short, *whenever Congress had intended to tax* obligations of the Government, *it has done so in express terms, and has left nothing to implication.* On turning to the War Revenue Act of 1898, we do not find a word on the subject, and the alleged taxation of the bonds becomes purely a matter of *unauthorized inference* based upon the use of the general words "*personal property.*" Indeed, it may fairly be presumed that, had it not been for the well-understood haste, on the verge of the war, with which that act was prepared, these bonds would have been *expressly exempted* from its provisions. Such an exemption, however, would have had no greater force or effect than the express exemption in the bonds themselves and the authorizing statutes.

Yet so difficult was the task of inducing investors

in United States bonds to accept this reduced rate of four per cent., one-fifth lower than the lowest previous rate, even with the proffered complete exemption from taxation, that it was not until about seven years after the enactment of this Refunding Act that the Government was enabled to "market" or sell any of these four per cent. bonds.

A provision of this Refunding Act required that these four per cent. bonds should be payable at a period not longer than thirty years from the date of their issue. The earliest issue of any of them cannot have been prior to July 1, 1877, as they are all made payable on July 1, 1907, being commonly known as the United States four per cent. bonds of 1907, and on the specimen form of them, in the *Appendix*, will be found the figures 1877–1907.

Notwithstanding their uniformity of date and time of maturity, they were actually issued at many different times, and many of them long subsequently to July, 1877.

It is too plain for dispute, that the exemption thus created and notified to lenders and intending lenders of money to the Government by means of purchasing the bonds, by way of inducement to them so to purchase, was an essential and important part of the contract between them and the Government, and that in accepting the very low rate of interest which was proposed to them, and making the loan or purchasing the bonds at that low rate, in reliance upon and because of such exemption, they paid to the Government *a full valuable consideration for the grant and assurance to them of such exemption.*

The grant of such exemption, under such circumstances, was in no wise against the interest of the Government at that time, but was *in and for its direct pecuniary interest.*

It was so intended and has so operated, and if in truth there be (as we think there is not) any real room for doubt as to the construction of the exemption, in respect of scope, extent or effect, we submit

that such construction must be upon the basis of treating the bondholders, not as grantees by way of favor or voluntary concession, but as *purchasers of the exemption for valuable and full consideration.*

There are certain authorities laying down the rule or principle that a certain species of public grants, or grants by the sovereign, of rights, privileges or franchises, are to be construed with strictness, so that the grantee shall not be allowed to take under them more than is clearly granted, and that implications in his favor are not to be indulged, but we think it has now come to be well settled that this rule or principle must not be carried to the extent of excluding anything which, upon fair and reasonable construction, appears to have been intended to be granted, nor even to exclude reasonable implications, when they appear to be needful in order to effectuate the actual intent.

> *Charles River Bridge* v. *Warren Bridge*, 11 Pet., 420, 549, 556-7; s. c., 7 Pick., 344, 462.
>
> *The Binghampton Bridge*, 3 Wall., 51, 74-75.

And it likewise appears to be well settled that the rule or principle of strictness in construction, which is above referred to, does not at all apply to grants for adequate valuable consideration.

> *Charles River Bridge* v. *Warren Bridge*, 11 Pet., at pp. 557 and 589.
>
> *Langdon* v. *Mayor, etc., of N. Y.*, 93 N. Y., 129, 144-147, *and authorities cited.*

We have shown above that, practically, the grant or concession of the exemption in question was, as respects the grantee or promisee, a purchase by him, for valuable and adequate consideration, and thus we think we may safely say that the principle of strictness in construction above referred to has no application in this case.

In this connection, we desire to call attention to, and claim the benefit of, two general rules of construction, applicable in ordinary transactions between individuals, which are entirely familiar, so that we need not cite authorities in relation to them; one is, the rule, that, in a grant, words used by the grantor shall ordinarily be construed most strongly against him and in favor of the grantee; and the other is, that, in ordinary bargains, agreements and transactions between individuals, words used, which are distinctly the language of one party, are to be construed most strongly against him and in favor of the other party, and especially so in cases where the language thus used has been originated and framed wholly by the party using it, without conference at all with the other party, and then communicated to such other party as part of a proposal for his assent to, and execution of the agreement, and upon such proposal has been assented to and acted upon by such other party in consummating the agreement.

We have presented in this case a very strong and striking case for the application of this rule or principle to the fullest extent. This scheme of exemption was originated by the Government, the language in which it was expressed in the Act of Congress, and on the face of the bonds, was framed by the Government, without any conference whatever with any of the bondholders, and was then communicated to the takers of this $700,000,000 loan as a basis upon which they were invited to accept the exceptionally low rate of interest of four per cent., and it was upon that basis, thus accepted by the bondholders, that the $700,000,000 was borrowed by the Government from the takers of this loan.

The general rule that, in such a case, the language must be construed most strongly as against the party employing it, is, as we have seen, as applicable to such an ordinary contract of the Government, on valuable consideration moving from the

other party, as to a contract between private individuals.

Garrison v. *U. S.*, 7 Wall., 688.

II.

Further observations on this general subject, with special reference to the necessary construction and legal effect to be given to this express exemption.

We now desire to present, by way of argument, certain propositions upon the question of the true construction of the exemption clause in question.

First.

Unquestionably this bond is a contract. Who are the parties to that contract? On the one side, is the United States; on the other, the bondholder whose name is inserted in the bond, "*or assigns.*" It certainly is not a contract with any one else. The bond declares, in substantial pursuance of the statute, an exemption of the principal and interest from the "payment of all taxes or duties of the United States" as well as from State taxation. In whose favor is this exemption created—to whom does the Government pledge its faith for its due observance? Certainly, the bondholder and his "*assigns*," and no one else.

We suppose that, possibly, it may be claimed on behalf of the Government that this is an exemption of the bond, merely, and not of the parties in interest. Must not any such claim be an absurdity? Can it possibly be intended that this was a promise to the inanimate thing, the bond? It may be noted that the language of the statute in regard to the exemption differs slightly in mere form, though not in substance, from that which the offi-

cials of the Treasury Department have inserted in the bond as in execution of the mandate of the statute. The statute is that the "bonds and the interest" thereon shall be exempted from the "payment of all taxes or duties of the United States" as well as from State taxation, and that the said bonds shall have "set forth and expressed upon their face the above specified conditions." In execution of this mandate, the Treasury officials have inserted in the bond the declaration that "the principal and interest" are so exempt. That is the practical construction which every Secretary of the Treasury has placed upon this exemption clause of the act from the time when the issue of bonds first began until the present time; and, as these bonds are constantly being reissued to new holders, as transfers are made from time to time, probably not one business day has passed in the Treasury Department within the last twenty years in which bonds containing this statement of exemption, in the language we have quoted, have not been issued by the Department. Can it possibly be said that the language used by the Treasury, as in execution of this mandate of the statute, was in any sense a departure from the true intent and meaning of the act itself? That the answer to this must be in the negative, appears to us to be too plain to make it worth while to spend any time in argument about it.

Now, what is the thing that is exempted from taxation by this Act and this declaration on the face of the bonds? It is not the paper writing, the mere bond. In its essence and substance, it is an exemption of the *indebtedness* of the United States which is evidenced and represented by the bond. If the bond were accidentally destroyed by fire or otherwise without fault of the holder, the indebtedness would remain in full force, and it cannot fairly be doubted that in such case the exemption would as completely apply to the indebtedness, the evidence of which had thus been lost, as it applied before such loss or destruction of the paper evidencing the indebtedness.

Second.

Upon the face of the bond, the obligation of the Government for the payment of the indebtedness and the interest upon it, runs to the original registered owner, whose name is stated in the bond, and to his "*assigns.*"

Unquestionably, this statement, making it run to the "*assigns,*" was not an improper act by the Secretary of the Treasury in framing the form of the bond. Who ever heard of a Government loan, or any other loan of money for a long term, which was not made assignable? If not so assignable, certainly the loan could not have been practically negotiated, and, as we have observed before, this form of bond has been practically in use by the Treasury Department from the beginning of the issue of bonds to the present time, and that practical construction could not now be challenged by the Government, if there were otherwise any possible foundation for such a challenge, as we think there clearly is not.

Now, who are the assigns entitled to the benefit of this contract? Unquestionably, the word "*assigns*" here used *covers assigns by operation of law as well as assigns by ordinary deed or act of transfer.* It covers a transfer by the owner in his lifetime. It covers the transfer by him by deed, operative upon his death and not before. *It covers a transfer by his personal representatives, that is to say, an executor or administrator, and unquestionably it was, and it has always been, so understood.* The last clause of the bond declares it to be "*transferable* on the books of this office."

Upon reference to the form of the bonds issued for the $700,000,000, which we have above given, it will be seen that the *Treasury officials* have placed upon the back of it a form of transfer in case one should be made, and in the *directions in relation to such transfer* thus placed on the back of the bonds,

will be found a provision as to what shall be done when the *assignment* is made "by * * * a *guardian, trustee, executor, administrator* * * * *or anyone in a representative capacity.*"

It has been customary to put directions of precisely this kind upon the back of the bonds since 1847, as appears from a copy of a letter from the Register of the Treasury to Mr. Carlisle, dated February 25, 1896, which is printed in the *Appendix* to this brief. Can it be supposed that it was ever intended or imagined by any one, when the Government borrowed a thousand dollars upon such a bond for the term of thirty years, which it agreed to pay at the end of the time to the lender, *or his assigns*, and meanwhile to pay the interest quarterly, that upon the death of the lender the right to this principal and interest should fall in, or that the indebtedness should not be paid to *the executor or administrator of the decedent, as being legally his assigns*, in like manner as it would have been payable to the decedent, if he had lived; and so, that the Government should have the advantage of *converting this thirty-year loan into a terminable annuity?* We do not argue on this point, as such an assumption would be manifestly absurd.

Enough has been said to show, if it were necessary for that purpose to say anything, that the right to the *principal and interest* of this bond passes, and was by the Government understood and expected to pass, upon the death of its holder, to his executor or administrator, as an "assign," as completely as it would pass by an ordinary transfer made by the decedent during life. Certainly, the executor or administrator is an "assign," and therefore the bond, by its express terms, becomes an obligation of the Government to him.

In the face of the express exemption declared on the face of the bond, that the principal and interest are *exempt* from the "*payment*" of all taxes or duties of the United States, can it rightfully be claimed that the executor or administrator, who

thus becomes the direct creditor of the Government as "assign" of the original creditor, can be made subject to the payment of a tax or duty of the United States *for or in respect of the very act which lawfully and in all respects properly makes him an assign?*

By the terms of the bond, as it is written on its face, the principal and interest are exempt from the payment of *all* taxes or duties of the United States. Clearly, this exemption has by contract been granted to all lawful holders of those bonds who are lawfully "assigns" of the original creditor.

Now, the present claim is that this lawful "assign," instead of being *exempted from*, shall be *subject to* the payment of a tax upon and in respect of the lawful act by which he became assign, and such tax, if the right to impose it exists at all, has no limit in amount other than the will of the Government imposing it. Under certain circumstances of the decedent, in respect of kindred and amount of property possessed by him, this tax upon personal property passing by will, under the construction given to it by the Commissioner of Internal Revenue, may extend to *fifteen per cent.* upon the principal; but there is nothing except the forbearance of the Government to limit it to fifteen per cent. If the Government can impose such tax at all, it may make it, if it chooses, twenty-five per cent, fifty per cent., or ninety-nine per cent. But if we suppose it to be raised to no more than twenty-five per cent. and that deaths occur as many as four times prior to the maturity of the bond, the Government might thus tax away from the creditor the whole amount of money which was originally borrowed, without paying a stiver of it. Is that the construction which this bond properly bears? When it was offered for purchase to an investor, either in this country or in Europe, who read the terms of the exemption set forth upon the face of the bond, as it was intended he should do, and for the purpose of the reading and understanding of which by him the law made

it mandatory that its executive officer should put the statement upon the face of the bond, could it ever have occurred to him, that this mode of paying the money which the Government borrowed, by taking it back to itself under this form of taxation, could be exercised in the face of the pledge under which he loaned it, that it should be wholly exempted from "*all* taxes or duties" of the United States?

Take the case of the holding of these bonds in large amount by an English capitalist, his dying, and the property (ancillary administration having been taken out in this country, where the bonds were found on deposit) passing to his legatee or next of kin, would not such legatee or next of kin receive with profound astonishment the intelligence that, notwithstanding the decedent had supposed he had made an investment exempt from all taxes or duties of the United States, the principal could be taken away by the United States in this manner; or that it could be so taken away to any extent? Indeed, before the days of the present *entente cordiale* between Englishmen and ourselves, which has lately come about, might not an Englishman of the old time under such circumstances have been tempted to make some uncomplimentary remarks in relation to such a performance upon its being brought to his notice?

We cannot fear that this Court will ever sustain any such proposition; and it must be recollected that the Congress of the United States have never taken any such ground. *There is nothing in the Act of* 1898, *under which this tax is claimed, indicating that any idea of imposing any tax upon United States bonds, which had a contract exemption from Federal taxation, was entertained by the lawmakers. On the contrary, there plainly appears on the face of the statute a non-intent in that respect*, as we think we have before sufficiently shown. We cannot believe that this Court will ever sustain any claim, on the part of the executive

officials of the Government, for the collection of such a tax on the exempted bonds. We are not here complaining of any of those officials for presenting the claim, and endeavoring to enforce it, and of course we have no idea of imputing blame to, or making personal criticism of, any of the law officers or counsel for endeavoring to sustain, as best they may, the claim in question after it has been brought into litigation, because, the amount being very large, they may fairly enough have supposed that it was their duty to make the attempt, but we think we may fairly say that it is not to the interest of this Government, either with regard to its own honor and good name, or even to its pecuniary interest in respect of possible occasion for obtaining future loans, that the claim should be sustained.

Now, the contention of our adversaries, if we understand it, is, as we have said, that we cannot successfully challenge this taxation, because they say the exemption is of the bond, and we are not the bond—in other words, that the exemption is granted to the inanimate thing.

That proposition appears to us to be so manifestly unsound that it is hardly worth while to answer it, yet we believe we have already done so.

Here certainly is a provision of exemption from the payment of all taxes. Surely, this is an exemption of the person who must pay the tax, if it is to be paid at all. The inanimate thing cannot pay it; that is very certain. If it is to be paid at all, it is to be paid by the executor or administrator, and *that is precisely what the section of the Act of* 1898 *imposing the tax requires*, if it requires this tax to be paid by anybody.

Third.

There can be no reasonable question of the proposition that this exemption clause cannot rightfully be construed inconsistently with what the bondholders were fairly entitled to understand to be the intent and meaning of the Government in the exemption clause, when it was proffered to them as an inducement to lend their money at an unprecedentedly low rate of interest.

The principal point at issue is whether, notwithstanding the contract exemption from all taxes and duties, the Government is entitled to impose this particular duty or tax. Protesting always that, so far as we can see, the mere fact that there is an express exemption from *all duties*, and that this is unquestionably a *duty*, is alone absolutely decisive of the question, and that any further argument on the subject is mere supererogation, we proceed at this particular place to call attention to certain circumstances which we think are sufficient to show that this particular burden of a duty, inevitably consequent upon death, could never have been anticipated by the bondholders when the loan was offered to them for acceptance.

As we have before said, the ultimate real lenders, other than such corporations as might choose to take the bonds, would naturally be, in the main, a class of persons putting their money in this loan, of long term and low rate, by way of permanent investment for the benefit of themselves and those who were to come after them—disregarding for this purpose the mere temporary holding of bonds by agents of the Government, or bankers and dealers acting as mere intermediaries in placing the loan in the hands of the real lenders. Naturally, such permanent investors would be persons no longer young; they would be persons who had lived long enough and done enough work in the world to have acquired property to sufficient extent to afford to take

such long-term investments at extremely low rates of interest. It may fairly be assumed that their average age would be rather over than under fifty, and that they would be tempted to accept this low rate of interest, if they accepted it at all, because of the assumed absolute certainty of the security and its absolute exemption from being in the least degree touched by taxation, while in the hands of themselves or in in the hands of their families, for whose benefit, rather than for their own, they made the investment—making it in substance for all who should come after them. We all know that, in very large measure, the labor and toil with which men seek to acquire property and deal with it, is usually, especially in the later period of life, more for the benefit of their families than of themselves.

If we can imagine the actual lenders of this seven hundred millions to be assembled in one great concourse, and the invitation of the Government to lend their money on this promised exemption to be communicated to them by word of mouth, by some emissary of the Government in a place large enough and with a voice loud enough to be heard by them all, would they not naturally have understood from all that would naturally have been said by this emissary of the Government, speaking according to the spirit of the law providing for this loan, that, if they contented themselves with this unprecedentedly low rate of interest, they and those to come after them during this term of thirty years could "sleep o' night's" without fear of ever being touched by the tax gatherer, in any manner whatsoever, in respect to this investment.

Of such a body of men, each one of them would certainly know that he was liable at any moment to be called away from life, and they would all understand that in ordinary course, long before the thirty years had ended, more than one-half of them would have gone to their graves. Instead of a personal assembly of intending lenders and a verbal communication to them of the invitation to accept the

exemption as a basis for their loans—which would have been, of course, impracticable—there was adopted by the Government, *ex industria*, the method of communicating such invitation by placing the declaration of the exemption on the face of the bonds which the lenders were invited to accept. Of this, the natural effect and result was as above stated with reference to the imaginary communication by word of mouth.

Now, if, notwithstanding the broad general terms of exemption from all taxes and duties of the United States, it had been intended by the Government that these investments should be subject to this unlimited power to tax away from the families or other successors in interest, upon the death of the original lenders, such portion of the principal of this loan, by the way of a tax consequent upon death, as it might choose, of its own mere will, without any limit in amount, was it not incumbent upon the Government, if it had any such idea, to apprise the persons from whom they proposed to borrow the money of the existence of such an intent? If it can be supposed that there really was such an intent, might it not fairly be said that the concealment of such intent, though it might not be legally a fraud, would be unfair and *misleading?* Certainly, no such intention to mislead can be fairly imputed to the Government or any of its officers or representatives, as having existed when this loan was obtained. If, at that time, it had been intended to reserve the power to impose such a tax, notwithstanding the broad terms of the exemption, the concealment of such intent would have been morally wrongful. If it was not intended to reserve such power, there is no just ground or reason for allowing such tax to be imposed now, in disregard of the intent and understanding of both parties at the time, to the great profit of the Government and the great loss of the bondholders.

Fourth.

The language of this exemption is, as we have before said, that there shall be a complete exemption from "*all* taxes or *duties.*"

We understand it to be now claimed on behalf of the Government that this particular tax is some peculiar kind of thing, of such extraordinary nature that it is not covered by the contract exemption.

As to that, it may be said in the first place that there is an exemption from *all* taxes whatsoever, which term unquestionably embraces as well indirect as direct taxes; and this *must be claimed as an indirect tax.* If it were a direct tax, it would fall to the ground *instanter*, because of not being apportioned as direct taxes are required by the Constitution to be.

Again, there is an exemption from all "*duties.*" This must unquestionably be regarded as a duty, if it is anything.

The Internal Revenue Act of June 30, 1864, six years anterior to the Refunding Act of July, 1870, (which is the first act containing the exemption in question,) shows *with absolute certainty* what, *at the time of creating this exemption*, the Government understood to be the proper term for describing a tax of this character, and that the word "*duty*" was such proper term. This Act of June 30, 1864, contains, in Section 124, an imposition of the burden of taxation upon legacies and distributive shares of personal property, in language very closely resembling that of the Act of 1898 imposing a tax of such character, and designates such tax as a "*duty*,"—the language being, that the persons upon whom the tax is imposed shall be, and hereby are, *made subject to a duty or tax* to be paid to the United States in the manner and to the extent thereinafter following. In the final clause of that Section (124), is the declaration that property passing to husband or wife shall be exempt from tax or *duty*, and in the next section,

125, it is provided that the tax or *duty* aforesaid shall be a lien and charge, &c. And *then* in Section 127 are the provisions imposing *a succession tax upon real estate* passing by will or upon intestacy —a tax which it must be admitted is in its nature of very close kindred with the tax upon legacies and distributive shares—and various regulations in relation to such succession tax. Upon examining these provisions it will be found that this succession tax is described as a "*duty*," pure and simple, without coupling that word with any other word. We quote from Section 133:

> "And be it further enacted that there shall be levied and paid to the United States in respect of every such succession as aforesaid according to the value thereof the following *duties*, that is to say."

There will also be found in that act a very great variety of internal revenue taxes, *e. g.*, upon auction sales, upon other sales, upon carriages, watches and silver plate, upon various manufactures, upon stamps, upon income, upon ale or beer, upon spirits, upon gross receipts of railroads, upon insurance and various other companies, and upon a great many other subjects, which we will not take time to particularize, in respect to which the term used is only "*duty*."

> 13 Sts. at Large, Chapter 173, pp. 223 to 306.

It is thus *conclusively established that at, and for many years before, the time when this exemption was created* by the Refunding Act of 1870, taxes of this precise character upon, or in respect of, the passing of personal or real property, by will or upon intestacy, were, by the Government, *understood and reckoned to be, and treated, as "duties."* How, in the face of this undeniable fact, the Government can now claim that an exemption from *all* "duties" does not include *this* duty, we confess our inability to understand.

We have the impression that the representatives of the Government have somewhere taken, or may take here, the position we have before mentioned, that we cannot claim exemption from this tax, because as they say, or may say, the exemption is only from taxes upon the bonds, and that this duty is not laid *upon the bonds*. It is nowhere provided that the exemption shall be merely from duties laid in form, or *eo nomine*, upon the bonds; it is *not at all* a provision that a *duty shall not be imposed upon the bonds*, but the provision is that the bonds shall be *exempt from the payment of duties*, and that exemption is not merely from duties laid directly or nominally upon the bonds, but unquestionably it is an exemption from the *payment of* all duties imposed upon, *or in respect of*, the bonds, directly or indirectly; the very idea of an *indirect* tax or duty is that, generally, it is not, or may not be imposed, upon the subject-matter taxed directly, *eo nomine*. The real substance and intent of this exemption provision, and so it should be construed, is, that this indebtedness of the Government, and the bond which evidences and represents it, shall be an *absolutely untaxable subject matter*, wholly free from the imposition upon, or in respect of, it, of any tax burden whatsoever, whether direct or indirect. Any construction which seeks to limit the effect of the exemption to a direct tax upon the bond itself, *eo nomine*, is not only a setting aside of the whole spirit and intent of the provision by a narrow and utterly inadmissible adherence to the supposed letter, but is likewise a *misreading even of the letter*.

It would hardly be denied, we suppose, that under this exemption of the United States bonds from all taxes or duties they are exempt from the ordinary annual tax laid by governments and municipalities upon personal estate, which, under the taxing systems of some of the States, including that of the State of New York, with which we are more particularly familiar, *does not describe or specify the particular items of property* making up the

amount for which the tax is imposed. A person is taxed, say, upon the amount of $100,000, as the assumed amount of personal property possessed by him. The tax is *not* imposed upon the property specifically, and in general the taxing commissioners, or other body assessing it, do not at all know of what the property consists. The tax is imposed *upon the individual for and in respect of the property which he possesses* or is supposed to possess. Then, if he complains of the amount of the tax which is imposed—not upon any particular property, but *upon him personally as a property holder* —and there comes to be a development as to what his property consists of, and it turns out that $50,000 of the $100,000 is United States bonds, he is entitled, in virtue of this exemption, to have that amount counted out of the general amount of the tax imposed upon him personally. So would it be in New York, in case there were a direct tax, apportioned as required by the Constitution, imposed by the United States upon him in respect of the amount of his estate, or its income, if the practical assessment and collection of the tax were in accordance with the State laws, as might well be the case.

So in regard to a great number of other things which may occur in respect of United States bonds of this character while a person holds them. Let us refer to some of such supposed things, and put the question whether he could not, because of the exemption, resist any such indirect tax in respect of those things or those occurrences, though they were not burdens imposed upon the bonds themselves.

Suppose a United States bondholder to make a gift *inter vivos* of some of his United States bonds—or that, finding it convenient to raise money, he should see fit to pledge them for a loan (and it is well understood by all acquainted with the subject that United States bonds form, of all so called "collaterals" for loans, the very choicest kind of security, one which will always command the money from money lenders, if there be money on hand to be loaned at the

time—and so far as United States bonds are held by men of business, the chief temptation to them to hold them, is that they can always raise money upon them at very short notice)—then suppose the holder of United States bonds chooses to sell them, as he certainly has the right to do—then suppose, perceiving the near approach of death, he chooses to make, in respect of them, a *donatio causa mortis*, in the exercise of the clear right which he possesses under the common law, not based on any statute—then suppose, instead of leaving the disposition of his property, or some portion of it, to a testament, he chooses to make a trust deed of his United States bonds, to become operative on his death, reserving to himself the use and income for his life, as he has a clear right to do—and then suppose the Government to undertake to impose a tax upon him in respect of these transactions respectively, and to defy his claim for exemption from such taxes under the exemption clause now in question, upon the ground that they were *not taxes laid upon the bonds, eo nomine*, but upon specific occurrences relating to them, could the Government escape the effect of the exemption, in respect of such taxes, upon the ground, in the case first supposed, that it was taxing, *not the bond, but the gift*, and in the second case that it was taxing, *not the bond, but the pledge*, and in the third case that it was taxing, *not the bond, but the sale*, and in the fourth case that it was taxing, *not the bond, but the donatio causa mortis*, and in the fifth case that it was taxing, *not the bond, but the trust deed conveying it?*

All these taxes, supposing them to be undertaken by the Government, would be *indirect taxes;* perhaps they might impose them, or some of them, if they had not precluded themselves from doing so, but the difficulty would be that they have, by the contract, upon which they have borrowed the money, absolutely precluded themselves from ever imposing, upon or in respect of those bonds or the

indebtedness of the United States which they represent, any taxation, direct or indirect. Nay, more, if the Government can thus palter with the real spirit and intent of this act, why not go a step further and say, in the case of a general taxation of a man upon or in respect of his personal estate, for or in respect of his property including his United States bonds, when he claims the exemption so far as respects his United States bonds, that the tax is not laid upon the bonds, nor even upon him, but merely upon his *ownership*, and so that the contract exemption avails him nothing. We do not see that this would be much more absurd than the claim that the tax is on the transfer, the gift, the sale, or the trust deed in the cases supposed.

Now, if it should be asserted that the Government can rightfully deal with this subject-matter after this fashion, getting the money upon the faith of this pledge and frittering away upon mere verbalisms the whole substance and intent of the provision, might we not justly say, using in respect of such a performance the memorable words of Lord DENMAN, when delivering his judgment in the House of Lords, in the case of the tampering with the jury lists on the trial of O'CONNELL, that to permit such performances would be to render this exemption, to which the Government has plighted its faith, and on the strength of which it has succeeded in borrowing the money, "a mockery, a delusion and a snare."

We can hardly suppose that the representatives of the Government will undertake to maintain any such proposition, and we are quite sure that, should they do so, they will receive therein no countenance from this Court.

There was a principle established nearly a century ago by this Court, enunciated by Chief Justice MARSHALL in the case of *Brown* v. *State of Maryland*, 12 Wheat., at p. 444, and repeated by this Court in numerous decisions since that time, down to and including its decision upon the War Revenue Act here

in question, in *Nicol* v. *Ames*, 173 U. S., 509, 521—that a *tax upon a sale, a right to sell, or any other incident of a thing, is the full equivalent of a tax on the thing itself.*

We do not think it worth while to waste time in citing in detail the numerous authorities establishing this principle, with which the Court is unquestionably quite familiar.

We submit with entire confidence that this doctrine, so long ago established by Chief Justice MARSHALL and his associates, is absolutely conclusive against the entire contention of the Government in this case.

Fifth.

We come now to the question, whether there is any such special feature or quality in the nature of taxes on legacies, distributive shares, successions and inheritances as to enable the Government to lift them out of, and exclude them from, the effect of this general exemption from all taxes and duties upon United States bonds. As to that, it is to be observed in the first place that *at the time of granting this exemption the Government perfectly understood, and had long been imposing, taxes of this precise character*, and had denominated them, in the act imposing such tax burdens, "duties." Then they grant an exemption, by way of inducement to a lender of money, *from all duties.* If it was their intent to claim that *this particular duty* was not *one of the "all"* against which they granted the exemption, was it not incumbent upon them to call the attention of the persons, to whom they extended the invitation to lend them the money under this exemption, to this particular and extraordinary feature? It seems to us it was clearly so, and that they would be entirely estopped by their own action from now taking any such ground, supposing they could in any case take it, as we think they could not. In-

deed, we do not see at all how the Government could, suitably or properly, have altered the effect of the exemption so as not to embrace a tax of this character, short of an actual distinct change of the language of this exemption, *e. g.*, making it read—

> "exempt from the payment of all taxes or duties of the United States, except taxes on legacies and distributive shares, successions and inheritances."

We desire now to state another proposition which, perhaps, to some extent, may repeat something that has been incompletely said before, as to which our apology must be found in the very great haste with which this brief has necessarily been drawn, because of the very short time allowed for preparing and filing it. Our proposition is this: This exemption is clearly an operative exemption granted to and subsisting in favor of the original bondholder and of all who, as assigns or successors in interest, have succeeded to his original rights, and it is as fully applicable to the successor as it ever was to the original party. The exemption, as we have said before, embraces, as the party entitled to it, all persons who have lawfully succeeded to the ownership of, or a legal title to, or interest in, the bond, and the exemption is in favor of all on whom the burden of the tax or duty would fall if there were no exemption. The ascertaining whether a present holder or party in interest is entitled, as successor in interest, to the exemption, involves an inquiry into merely one question. Is he the *lawful assignee* of the original holder and the exemption which forms part of the bond? If he is, he is entitled to the exemption, *i. e.*, freed from any burden arising to him from or by reason of the tax or duty, exemption from which has been pledged by the Government. He is entitled to be in all respects in as good a position as if the supposed tax had no existence; as to him it has no existence, because the Government has abdicated, by its own will, its original power to impose it.

Now, is there any legal ground for distinction between the rights of the executor or administrator, in this respect taking by operation of law, and the right of any other assignee or assign of the original bondholder? We submit that there is not—that the simple question is, Is he the lawful successor in interest and holder of the right of the original bondholder? If he is, the exemption has been in legal effect transferred to him. If the bondholder had been alive, he would have held and represented the entire right to the benefit of the exemption, and he could not be compelled to pay any tax in respect of which there was an exemption. If he did have to pay it, of course, he would pay it from his own money.

The provision of the Act of 1898, under which this tax is claimed, provides that *the executor or administrator shall be subject to and shall be compelled to pay the tax*, but that as between him and the beneficiary he shall be entitled to credit for the payment so made. The substance of this is, that the trustee holding the legal title to the subject-matter pays the tax, and ultimately the beneficiary has to bear it. The executor or administrator and the beneficiary, together or in their united interests, represent the entire title to and interest in the bond and exemption, as fully as the original holder did, and the case merely is, that the executor or administrator and beneficiary, taken together, have the same exemption from being compelled to pay as the original bondholder had, neither more nor less. Nor is there any ground for distinction between the position of the executor or administrator and his beneficiary, representing and holding the original interest of the decedent, and the position of a transferee of the bond holding upon transfer of any description made *inter vivos*. It seems to us that clearly there is *not* any such difference in respect of indirect duties of such character as we have referred to, viz., duties in respect of gift, pledge, sale, *donatio, causa mortis*, transfer by

trust deed, and transfer in virtue of the laws of the State in consequence of the death of the decedent. It is true there is one distinction between the case of the transfer *inter vivos* and the other supposed occurrences which might have happened during the life of the original creditor, and the case of the transfer upon occasion of death; but it is not a difference operating in favor of the contention of the Government so as to entitle it to impose a tax in one case when it could not impose it in the other. In case of a transfer *inter vivos*, it is certainly a lawful transfer, and in case of the transfer in pursuance of law consequent upon death, it is an equally lawful transfer, but the difference which might be suggested is, that in life the bondholder may, if he so choose, avoid the making of the gift, the pledge, the sale, the *donatio causa mortis*, or trust deed, and it might be argued, we do not say reasonably so, that, if he did not like to be subjected to the tax for doing those things, he might avoid doing them, but there is no such option on the occurrence of death, absolutely inevitable and sure to come sooner or later, and there is no possibility of avoiding the devolution of the property according to law, if it remain the property of the bondholder at the moment of death.

There is another proposition which has been sometimes stated in reference to the nature and effect of the transfers of property which follow and are inevitably consequent upon the death of the owner. It is sometimes said that upon the death of a person owning property there is no absolute right of any one to the property which he possesses at his death, and that if any one gets any of it as next of kin, legatee or otherwise, he gets it by grace and the favor of the State in permitting him to receive it. It is said in substance, if we understand the proposition, that at the death of a person all the property that he owned, of whatever kind, belongs *potentially* to the State, and that therefore, taxation may be imposed upon property of that description

ad libitum, and, if anyone gets anything out of such property, he should be thankful for the favor, and has no right to ask any questions as to anything taken out of it by anyone else. We cannot think that that is sound law altogether, but, if it is, we submit, that it does not help this contention on the part of the Government one iota. If it be true that at death the State Government has the right to take the whole property of the decedent and either keep it itself or do what it chooses with it, that does not give any other government any right to lay a finger upon it. The United States, in case of the death of a citizen, cannot lay its hand upon a sixpence of the decedent's property *otherwise than by the lawful* exercise of its taxing power, and, so far as respects the United States bonds in question, it has abdicated that power.

As this Court said, in distinguishing *Scholey* vs. *Rew*, 23 Wall., 331—

> "It was like the succession tax of a State held constitutional in *Mager* vs. *Grima*, 8 How., 490, and *the distinction between the power of a State and the power of the United States* to regulate the succession of property was not referred to, and does not appear to have been in the mind of the Court."
>
> *Pollock* vs. *Farmers' Loan and Trust Company*, 157 U. S., at p. 578.

We do not propose in this brief to discuss questions arising or which may arise in relation to this asserted power of the State government to treat itself, as it were, as forced heir of any of its citizens who dies, and to take to itself all his property and deal with it as its own as it chooses. We believe there is no decision in this Court which establishes that supposed proposition. There have been, we believe, perhaps some few decisions and a good many *dicta* of various Judges upon that subject, and discussion in relation to it may be very pertinent in a case which will soon come before this Court in reference to the power of the *State* to tax the exempted

United States bonds by a legacy or succession tax. We certainly are not prepared to accept this doctrine to the full extent that is sometimes claimed. The discussion of it would be quite long and perhaps highly interesting; but, as it is not material to the decision of this case, we do not propose to enter upon it. Some of the *dicta*, at least, strike us as rather strange, but we venture to say no more than this, which we think we may say without being chargeable with the crime of speaking evil of dignities, that sometimes some Judges in some States of this Union have said things which were not wise.

Now, we have to inquire what is or what would be the effect upon the question in this case, *viz.*, the liability of the United States bonds to Federal taxation, of the assumed right of the State as sovereign to take to itself all the property of the deceased in disregard of his will and of any supposed rights of his next of kin. It seems to us that that question can have no application or effect in testing the right of the United States to tax these bonds, because, admitting that the State might have taken to itself by a species of confiscation, as it were, the whole property of the decedent, including United States bonds, it certainly has not done so, and it may be safe to say that it never will do so, unless we are to return to a state of barbarism. It seems to us that this *practical question* is not to be dealt with upon the supposition of this imaginary and practically impossible basis, of the State grabbing the entire property of a citizen as its own the moment the breath leaves the body. The question is, what is the property right of the personal representative of the decedent, who has taken his title, as such, to the United States bonds in question, by due operation of law, under a system which has existed almost from time immemorial, certainly for many hundreds of years. But we say further, and we think with entire soundness as a legal proposition, that if there can be lugged into this case, for the purpose of enabling the United States to escape from this

contract exemption, this extraordinary supposed right of the State as a sovereign to take the entire property upon the death of the decedent, the possibility of such dealing with the property of the decedent can give the Government no greater right than would the actual occurrence of this extraordinary performance by the State, supposing it should be entered upon by it.

Now, let us inquire what would be the status of the Government in respect of the exempted United States bonds held by the decedent at the time of his death, supposing the State should exercise this assumed right of taking to itself as owner the whole property of the decedent. If it lawfully could, and actually should do that, the whole subject-matter, including the United States bonds, would become the property of the State *instanter* upon the occurrence of death, and supposing the United States to be precluded, as certainly it was, by the exemption, from any taxation of these bonds up to the moment of the death of the decedent, then *at the moment* of the State's acquisition of the property, and from thenceforth so long as the State continued to hold it, the United States would be unable to tax it, not merely because of the exemption, but because of the inherent lack of power of the United States to tax the property of the State. That proposition is indisputable, and has always been recognized; and, the United States having no power to tax the bonds while the property of the State, it would be equally precluded, by the inherent lack of power which we have referred to, from taxing any transfer by sale, gift or otherwise which the State might choose to make of the property. If the property belongs to the State, it can give it away to whomsoever it pleases; as to that, it has absolute and complete *jus disponendi*, and the United States cannot tax that action of the State in any form whatever. Take the case of a State lawfully and fairly becoming entitled by escheat to the real estate of a citizen dying without heirs; of course, that

property could not be taxed by the Government of the United States while the State held it. Then, supposing the State should see fit to turn around and give the property to the widow, the United States could not tax that gift to the widow, whether the gift were made by an act of the Legislature or in any other form whatsoever.

Indeed, any transfer or disposition *which the State may choose to make* of any property which it may have acquired, either actually or potentially, from a decedent under the alleged sovereign right which has been referred to, by any method it may choose to adopt for such purpose, is in no wise taxable by the United States.

Suppose the State should choose to give property belonging to it, either by act of the Legislature or by any other method, to a college, library, church, hospital, or any other subject upon which it might choose to confer a benefaction, could any such gift be taxed by the United States? Suppose the State chooses to supplement the pension and bounty afforded by the United States to its soldiers by a State pension or bounty, as has sometimes been done,—can it be supposed that that State pension or bounty could be taxed by the United States? Suppose that, instead of doing any such thing as above suggested, the State should choose to sell the property, at auction or otherwise, and put the money in its Treasury and expend it for general purposes, could the auction or other sale, or anything in connection with it, be taxed by the United States Government? It would be idle to pursue these illustrations further, because it is too plain for dispute that any act of the State disposing of the property which belongs to it, either by sale or gift, or any other method, is no more taxable by the United States than is the property of the State while it continues to hold it.

Now, we do not need to say, and it is no part of our contention, if the State has thus sold or given away property which it acquired, either lawfully and properly by escheat, or by becoming as the

sovereign the necessary distributee or successor of a person dying intestate and without next of kin, or which it may have acquired by the supposed "grab" of the whole property of a decedent, under the doctrine above referred to, the supposition of which is invoked against us for destroying our contract right of exemption, that, after the property thus taken by the State has become again individual property as part of the property of the donee or purchaser, it may not be subject like other property in the hands of individuals to the legitimate exercise of the taxing power by the State or United States, exactly as if this extraordinary event in the devolution of the right to it had not occurred, but the difficulty *then* in the way of defeating us of our just rights under the exemption would be that at the moment when the exemption of the State under its inherent immunity would have ceased, the contract exemption would have become operative and effectual, for the benefit of the donee or purchaser, who would then have become the lawful owner of the bonds and in legal effect the "assign" of the original holder.

We desire to make some observations in relation to certain propositions by way of argument contained in the additional brief of the Solicitor General, dated December 13, 1899, that being the only brief on that side which we have been able to examine, and we have to do this very briefly, under great pressure of time.

This brief seems to assume that the practical operation of the claims made by the parties to the record adverse to the Government, in respect of the inherent lack of power of the United States to tax franchises or privileges granted by the State, or things done by the grantees of such privileges or franchises in execution of the powers conferred upon them, would, if practically applied, cut up or destroy in great measure the Internal Revenue Taxes of the United States. What may have been claimed on this subject by the parties to the record adverse to the Government we do not at all know, nor do we pre-

cisely understand at this moment what the Solicitor General claims in this respect. What we have to say on this subject, we are obliged to say in very few words, and the general meaning and intent of what we have to say, and the distinction we draw, may, we think, be fairly understood from a single illustration. If a State grants a charter to a bank, which is a franchise, and the bank engages in operations that might as well have been done by an individual, supposing there were no law restraining individuals from such action, say receiving deposits, making discounts, &c., we might not be disposed to deny that the Federal Government would have a like right to tax such *transactions* carried on by the corporate body as it would have to tax them if carried on by an individual. But we submit that it is quite clear that, supposing the United States could thus tax the transactions, *it could not tax the charter granted* by the State. It is the *grant, gift, privilege, right, or power* conferred by the State which is absolutely exempted. That is our contention. We think this sufficiently indicates the distinction which we make. We do not intend, in anything we say on this subject, to interfere in the slightest degree with any contention on the subject which may have been made or may be made by the parties to the record.

Inasmuch as the only brief on behalf of the defendants in error which we have seen, viz., this additional brief of December 13, 1899, does not discuss nor even allude to the contract exemption which is the basis of our contention, we are left to conjecture as to what answer the Solicitor General may make to our propositions asserted in this brief.

We are inclined to think, from some things we have heard, that he may present a line of argument, that this is a tax upon some privilege alleged to have been derived from the State, either of disposing of the property by will, or of receiving the benefit of such a disposition, or perhaps of both such supposed privileges. Inasmuch as we shall have no opportunity to reply to any answer the Solicitor General

may give to our arguments, we think it best to make here, as briefly as may be, such reply by way of anticipation.

We think that any such contention on behalf of the Government must necessarily be ineffectual and wide of the mark, because of its not being directed to the real point upon which the case turns.

Our contention is *not* a dispute of the right of the United States to impose a tax, *in general*, upon the transfer or passing of the personal property of a deceased person, upon and in consequence of his death, under and in pursuance of the laws of the State of his residence, to his executors or administrators in the first instance, and subsequently, in due course of administration, after payment of debts and expenses by the executor or administrator, to legatees or next of kin as distributees according to their rights under his will, or upon his intestacy.

We do not feel called upon to affirm or admit the existence of a right in the United States to impose such a tax, upon or in respect of the passing or transmission of the *property in general* of the decedent. It is not requisite for our purpose in this case to deny the existence of such a right.

All points of inquiry in relation to the nature, extent and effect of such a tax when imposed, and as to whence, or how, the power of the United States to impose it has been derived, and as to the cause or reason for imposing the tax, *e. g.*, as for some supposed privilege to transmit from the dead to the living, and as to whether, ordinarily, it should be ranked as a direct or indirect tax, however important such inquiries may be or may have been in other cases, are of no practical importance here. The point, whether it is a direct or indirect tax, is here settled by the agreement on all hands that it is an indirect tax.

Conceding the original right to impose such a tax, there can be no possible doubt of the right of the Government to renounce such right in particular cases, or in respect to particular property, and the question is, whether they have so renounced in re-

spect to this particular property—these bonds. It is indisputable that if, by lawful contract, these particular bonds have been *established by the Government as an absolutely untaxable subject-matter* all such inquiries as we have alluded to, and all inquiries of like nature, have become utterly immaterial. We think that we have, in other places in this brief, said enough to show, beyond peradventure, that, when considered with reference to either its language, or its intent, or both, the exemption of these bonds is effectual to exempt them as well from this particular tax as from all others.

The exemption in the bonds is a contract, extending through a period of years until maturity, in favor of the *holder, or "assigns,"* for the time being. It is an exemption from the "*payment*" of all indirect taxes or "duties," as well as from direct taxes, *operating in favor of the executor or administrator, as such holder, or of the legatee or distributee entitled to the beneficial interest therein, as fully as in the case of any other holder or "assign."* Just as it is the holder who must *pay* the tax, if there be no exemption, *so it is the holder in whose favor such an exemption must operate.* The executor or administrator is directed to pay this tax on "personal property" in general, by the mandate of the statute. But, by the equally potent mandate of the statutes authorizing these bonds, he is *exempted from the "payment" of "all" such* taxes on this particular species of "personal property"—*the United States bonds* in question.

For whatsoever cause, whether through the exercise of some right or privilege, or otherwise, this tax is imposed, the person who, if there were no exemption, would be obliged to make "payment" of the tax, is, by this express contract, exempted from such "payment"

In conclusion, we have this to say upon the general merits of this controversy and in reference to the

spirit and general principles upon which we think this question ought to be determined.

It is not a question of law, in the ordinary sense, but is a question as to the true construction and effect of the language of a contract entered into between the Government and individuals, the language having been devised by the Government, and proferred to and accepted by the individuals as the basis upon which loans of money were made to the amount of upwards of a thousand millions. This contract upon its face appears to be very plain, simple and conclusive. It was offered for the action of a vast body of laymen. It has been accepted and acted upon accordingly. It seems to us that the grounds upon which it is sought to be construed, so as to elude the exemption, are extremely artificial, based upon supposed technicalities, and that it may not be inappropriate for us to say that they are rather verbal subleties than anything else. The substance of the matter is, that the Government for its own necessity, and as part of a scheme of saving money to a great extent in refunding its debt, which scheme has been successful to its very great profit—legitimate enough—originated the idea of this exemption, by way of inducement to the taking of its loan at a greatly reduced rate of interest, framed the form of the exemption and communicated it to the bondholders in the most effective manner, so that it was accepted and acted upon, and the money borrowed upon the faith of it and upon the understanding of its import and effect, which was naturally deduced from the language which the Government employed in framing it; and we think there can be no doubt that that language was understood, and rightfully understood, by the persons who accepted and acted upon it, as containing a complete exemption from taxation of any and every kind by the United States, upon or in respect of the bonds or the debt which they represented, and in full faith and confidence that, by the investment which they thus made at a

rate of interest theretofore unprecedented in United States loans, they had secured for the benefit of themselves during their lifetime, and for their families who were to come after them, a complete and thorough exemption from subjection to taxation in any form or to any extent whatsoever by the United States. The language is that they shall be exempted from the payment of all duties and taxes whatsoever. In our view, this case involves, on the part of the Government, so far as these bonds are concerned, an attempt radically to change the words, "exemption from," to the rather opposite words, "subjected to." The words "subject to" are the precise ones used in this taxing act, and it seems to us that no such violent change of language should be permitted to one party to such a transaction to the prejudice of the other, except upon the highest and most absolute necessity, and consistently with entire good faith and fair dealing on the part of the Government. We think that there is no substantial basis upon which, consistently with good faith and justice, any part of the principal of these bonds can be taxed away from them, or from the original bondholders, or from their families coming after them.

In respect of this highly artificial basis, which we believe is the main reliance of our adversaries—that this property is held by the representatives of the decedent, the personal representatives, who hold the legal title, and the beneficiaries for whom the personal representatives hold it, in the exercise of some peculiar privilege or franchise, which they say can be taxed, we have this further to say:

Whatever may be the language and effect of this so-called right or privilege of having one's property go at one's death to his next of kin or to his appointees by will, it is no new right or privilege created after the passage of this act. It makes no difference, in our view, whether such right was created by common law or by statute. Howsoever it was created, it has been in existence for many hun-

dreds of years, and it is safe to say that so long as civilization remains it will never be taken away. If we are not mistaken, the power of disposing of personal property by testament existed in some form in England, even in the days when England was under Saxon rule, we think in the reign of King Alfred.

If this right can legitimately be called a franchise or privilege, it is *not* so in virtue of any *special* grant, privilege, or franchise, but it is a right *existing by the law of the land in any and every person.* To speak of this *right*, even in a general sense, as a taxable privilege, would be, to our minds, absurd. But we do not dispute the right to tax *transactions or dealings* by persons, in the exercise of such a right of this general nature, *if* the transaction or dealing is, in its own nature, *properly taxable. Here, the exemption contract makes this particular transaction non-taxable, in the case of these bonds.*

Without entering into further particulars or making further argumentative remarks, we think we may fairly rest upon the general principle, that this contract having been devised by the one party and accepted by the other under the circumstances which appear, it should not be permitted, and we feel that it will not be permitted, by this Court, to be eluded by hypercriticism or by any verbal refinements, wholly inconsistent with justice, and wholly disappointing to the rightful understanding and just expectation, in respect of the effect of this contract, under which the original lenders were induced to part with the thousand millions, or thereabouts, by way of loans to the Government.

EVARTS, CHOATE & BEAMAN,
Attorneys for CHARLES F. SOUTHMAYD *and others, holders of United States Bonds.*

CHS. F. SOUTHMAYD,
In Person,
WILLIAM V. ROWE,
Of Counsel.

APPENDIX.

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., January 3, 1900.

Messrs. EVARTS, CHOATE AND BEAMAN,
New York, N. Y.

GENTLEMEN:

In response to your telegraphic request of this date, I enclose herewith a copy of the latest debt statement giving the total amount of bonds outstanding and the amounts issued under each act. I also enclose copy of a document addressed to the Senate of the United States in response to a resolution, said document giving a copy of each obligation of the United States issued since 1792, with the exception of the three per cent. loan of 1898. The text of the three per cent. bonds as to the clause exempting them from taxation is as follows: "The principal and interest are exempt from all taxes or duties of the United States as well as from taxation in any form by or under State, municipal or local authority." *Each bond of the United States now outstanding, whether registered or coupon, contains the exemption clause above quoted or stated in the document herewith enclosed.*

Respectfully yours,

L. J. GAGE,
Secretary.

STATEMENT OF THE PUBLIC DEBT

AND OF THE

CASH IN THE TREASURY OF THE UNITED STATES

FOR THE MONTH OF DECEMBER, 1899.

INTEREST-BEARING DEBT.

Title of Loan.	Authorizing Act.	Rate.	When Redeemable.	Amount Issued.	Outstanding December 31, 1899.		
					Registered.	Coupon.	Total.
Loan of July 12, 1882.....	July 12, 1882.....	3 per cent.....	Option U. S.	$305,529,000 00	.....	.....	.....
Funded Loan of 1891.....	July 14, '70, and Jan. 20, '71.....	4½ per cent. ..... Cont'd at 2%	September 1, 1891... Option U. S.....	250,000,000 00	..... $25,364,500 00	.....	$25,364,500
Funded Loan of 1907.....	July 14, '70, and Jan. 20, '71.....	4 per cent.....	July 1, 1907	740,914,650 00	478,219,100 00	$67,147,450 00	545,366,550
Refunding Certificates...	February 26, 1879	4 per cent.....	.....	40,012,750 00	.....	.....	37,170
Loan of 1904	January 14, 1875.....	5 per cent.....	February 1, 1904	100,000,000 00	64,307,350 00	30,702,350 00	95,009,700
Loan of 1925.....	do	4 per cent.....	February 1, 1925	162,315,400 00	117,690,150 00	44,625,250 00	162,315,400
Ten-Twenties of 1898.....	June 13, 1898.....	3 per cent.....	After Aug. 1, 1908.....	198,679,000 00	109,426,680 00	89,252,320 00	198,679,000
	Aggregate of Interest	Bearing Debt	.....	$1,797,450,800 00	$795,007,780 00	$231,727,370 00	$1,026,772,330

[Of the following document, referred to in the Secretary's letter, we print only the material portions, including only forms of the bonds issued under the Refunding Act and subsequent acts, and now outstanding.]

54th Congress, 1st Session. SENATE. Document No. 154.

IN THE SENATE OF THE UNITED STATES.

March 9, 1896.—Referred to the Committee on Finance and ordered to be printed.

The Vice-President presented the following:

LETTER FROM THE SECRETARY OF THE TREASURY, TRANSMITTING, IN RESPONSE TO RESOLUTION OF THE SENATE, DATED DECEMBER 31, 1895, THAT THE SECRETARY OF THE TREASURY BE DIRECTED TO REPORT TO THE SENATE A STATEMENT CONTAINING A COPY OF EACH OBLIGATION OF THE GOVERNMENT SINCE MARCH 4, 1789, ETC., PAPERS CALLED FOR BY SAID RESOLUTION.

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
Washington, D. C., March 5, 1896.

SIR.—I have the honor to transmit herewith, in response to Senate resolution dated December 31, 1895, receipt of which was acknowledged January 8, 1896, the papers called for by said resolution, which was as follows:

> *Resolved*, That the Secretary of the Treasury be, and he is hereby, directed to report to the Senate a statement containing a copy of each obligation issued by the Government since March 4, 1789, with a reference by title and date to the laws respectively authorizing

such issues, and showing the amount of each issue and the amount now outstanding, properly classified, and including Treasury notes of every kind, bonds and certificates for currency, silver, and gold.

I also inclose copy of a letter on the subject from the Register of the Treasury, dated February 25, 1896.

* * * * * *

Respectfully yours,

J. G. CARLISLE, *Secretary.*

The PRESIDENT OF THE SENATE.

TREASURY DEPARTMENT,
OFFICE OF THE REGISTER,
Washington, D. C., February 25, 1896.

SIR: On January 13 I received from you a resolution passed by the United States Senate on December 31, 1895, as follows:

> *Resolved*, That the Secretary of the Treasury be, and he is hereby, directed to report to the Senate a statement containing a copy of each obligation issued by the Government since March 4, 1789, with a reference by title and date to the laws respectively authorizing such issues, and showing the amount of each issue and the amount now outstanding, properly classified, and including Treasury notes of every kind, bonds and certificates for currency, silver and gold.

In reply to the foregoing resolution, which is herewith returned, I have the honor to transmit the accompanying report. It contains a table showing the amount of all obligations of the Government since March 4, 1789, classified by loans, and with appropriate references to the volumes and pages of the authorizing acts as given in the Revised Statutes. The table also shows the amount which on January 1, 1896, appeared to be outstanding under each class

of security, as shown by the books of the Department.

Probably some of the issues are not those contemplated by the resolution, but it was deemed wiser to make the table include all the loans of the Government than to attempt to construe the meaning of the resolution. The tables include the three loans of the District of Columbia issued under authority of acts of Congress. In several cases it should be understood that the amounts given as issues include a large amount which may be classed as reissues.

I have also given, as fully as could be done, *copies of each kind of obligations which have been issued by the Government.* This series is believed to be complete for all issues subsequent to 1822, and it includes several of the most important issues of an earlier date. Coupon bonds were not used in connection with the earlier issues of the Government, but in issues which include both coupon and registered bonds it has been considered to meet the purpose of the resolution to give a copy of either, but not of both. It has not been considered necessary to give a copy of more than one denomination. On the earlier loans (with some exceptions) it was not customary to print the denominations, and the amount for which a bond was issued was written in with a pen.

Since 1847 *it has been customary to print on the back of registered bonds a blank form for convenience in making assignments.* As these are *almost identical in phraseology*, and constitute no part of the obligation of the Government, it has been considered unnecessary to repeat the form with each bond. *An example of this form may be found with the* 4 *per cent. consol bond of* 1907.

* * * * * *

Respectfully yours,

J. F. TILLMAN,
Register.

Hon. JOHN G. CARLISLE,
Secretary of the Treasury.

* * * * * *

OBLIGATIONS ISSUED BY THE UNITED STATES GOVERNMENT SINCE MARCH 4, 1789.

* * * * * * * *

Five per cent. funded loan of 1881.

Series of 1878. WASHINGTON, May 1st, 1871.

Funded Loan of 1881 (Interest five per cent.)

Principal and Interest payable in 1000 Coin at the Treasury of the United States. (Seal)

THE UNITED STATES OF AMERICA.

Are indebted to....., *or assigns*, in the sum of one thousand dollars. This bond is issued in accordance with the provisions of an act of Congress entitled "An Act to authorize the refunding of the National Debt, approved July 14, 1870, amended by an act approved January 20, 1871," and is redeemable at the pleasure of the United States after the first day of May, A. D. 1881, in coin of the standard value of the United States, on said July 14, 1870, with interest in such coin from the day of the date hereof at the rate of five per centum per annum, payable quarterly, on the first day of February, May, August and November in each year. *The principal and interest are exempt from the payment of all taxes or duties of the United States, as well as from taxation in any form by or under State, municipal or local authority. Transferable on the books of this office.*

Date of issue.....
Entered.....
Recorded.....

.....
Register of the Treasury.

Act of July 14th, 1870.

Five per cent. loan of 1881, *continued at* 3½ *per cent.*

Series of 1878. WASHINGTON, May 1st, 1871.

Funded loan of 1881 (Interest 5 per cent.)

Principal and Interest payable in coin at the Treasury of the United States.
10,000

THE UNITED STATES OF AMERICA

Are indebted to .....*or assigns*, in the sum of Ten Thousand Dollars. This bond is issued in accordance with the provisions of an act of Congress entitled "An Act to authorize the refunding of the National Debt, approved July 14, 1870, amended by an act approved January 20, 1871," and is redeemable at the pleasure of the United States after the first day of May, A. D. 1881, in coin of the standard value of the United States, on said July 14, 1870, with interest in such coin from the day of the date hereof at the rate of five per centum per annum, payable quarterly, on the first day of February, May, August and November in each year. *The principal and interest are exempt from the payment of all taxes or duties of the United States, as well as from taxation in any form by or under State, municipal, or local authority. Transferable on the books of this office.*

{Seal of U. S Treas. Dept.}

Date of issue .....
Entered .....
Recorded .....

.....
Register of the Treasury.

Ten Thousand Dollars. Act of July 14, 1870. Ten Thousand Dollars.

(Memorandum printed across the face of the bond.) At the request of and for value received by the owner of this bond, the same is continued during the pleasure of the Government, to bear interest at

the rate of three and one-half (3½) per centum per annum from August 12, 1881, as provided in Treasury circular No. 52, dated May 12, 1881.

Four and one-half per cent loan of 1891.

WASHINGTON, Sept. 1st, 1876.

FUNDED LOAN OF 1891.

Principal and interest payable in coin at the Treasury of the United States.

Interest 4 1/2 per cent.

THE UNITED STATES OF AMERICA

Are indebted to---- ----------*or assigns*, in the sum of Ten thousand Dollars. This bond is issued in accordance with the provisions of an Act of Congress, entitled "An act to authorize the refunding of the National Debt, approved July 14, 1870, amended by an act approved January 20, 1871," and is redeemable at the pleasure of the United States after the first day of September, A. D. 1891, in coin of the standard value of the United States, on said July 14, 1870, with interest, in such coin, from the day of the date hereof, at the rate of four and a half per centum per annum, payable quarterly, on the first day of December, March, June and September in each year. *The principal and interest are exempt from the payment of all taxes or duties of the United States, as well as from taxation in any form by or under State, municipal or local authority. Transferable on the books of this office.*

Date of issue----------
Entered----------
Recorded ----------

Register of the Treasury.

Act of July 14, 1870.

Four and one-half per cent. loan of 1891, funded, continued at 2 per cent.

WASHINGTON, Sept. 1, 1876.

FUNDED LOAN OF 1891. M.

Interest 4½ per cent.

Principal and Interest payable in coin 1000 at the Treasury of the United States. A.

THE UNITED STATES OF AMERICA.

Are indebted to....., *or assigns*, in the sum of one thousand dollars. This bond is issued in accordance with the provisions of an Act of Congress entitled, "An Act to authorize the refunding of the National Debt, approved July 14, 1870, amended by an act approved January 20, 1871," and is redeemable at the pleasure of the United States after the first day of September, A. D. 1891, in coin of the standard value of the United States, on said July 14, 1870, with interest, in such coin, from the day of the date hereof, at the rate of four and a half per centum per annum, payable quarterly, on the first day of December, March, June and September in each year. *The principal and interest are exempt from the payment of all taxes or duties of the United States, as well as from taxation in any form by or under State, municipal or local authority. Transferable on the books of this office.*

Date of issue.....
Entered .....
Recorded .....

.....
Register of the Treasury.

Act of July 14th, 1870.

(Memorandum printed across the face of the bond.) At the request of and for value received by the owner of this bond, the same is continued during the pleasure of the Government, to bear interest at the rate of two (2) per centum per annum from September 2, 1891, as provided in Treasury circular No. 99, dated July 2, 1891.

Four per cent loan of 1907, consols.

(Face of bond.)

1877 1907. M

FOUR PER CENT CONSOLS OF THE UNITED STATES.

A 4

Washington, July 1st, 1877.

Principal and interest payable in coin One M Thousand at the Treasury of the United States.

THE UNITED STATES OF AMERICA

Are indebted to.....*or assigns*, in the sum of One Thousand Dollars. This bond is issued in accordance with the provisions of an act of Congress entitled "An act to authorize the refunding of the National Debt, approved July 14, 1870," amended by an act approved January 20, 1871, and is redeemable at the pleasure of the United States after the first day of July, A. D. 1907, in coin of the standard value of the United States on said July 14, 1870, with interest, in such coin, from the day of the date hereof, at the rate of four per centum per annum, payable quarterly, on the first day of October, January, April, and July in each year. *The principal and interest are exempt from the payment of all taxes or duties of the United States, as well as from taxation in any form by or under State, municipal or local authority. Transferable on the books of this Office.*

Date of issue.....
Entered .....
Recorded .....

.....
Register of the Treasury.

Act of July 14th, 1870.

(Back of Bond.)

Act of July 14th, 1870. Amended January 20th, 1871.

TRANSFER (NO.....).

Original Date.... Original No.....

1000. FOUR PER CENT. CONSOLS. 1877-1907.

For value received,.....*assign to*..... the within registered bond of the United States, and hereby authorize the transfer thereof on the books of the Treasury Department.

Dated.. ....., 18..

State of ....., County of ....., Town of.....

Personally appeared before me the above named *assignor*, known or proved to me to be the ..... payee of the within bond, and signed the above transfer, acknowledging the same to be his free act or deed.

Witness my hand, official designation, and seal.

.....

NOTE.—The execution and acknowledgment of *the above assignment*, when not made at the Treasury Department, must be before a U. S. Judge, U. S. district attorney, clerk of a U. S. court, collector of customs, collector or assessor of internal revenue, U. S. Treasurer or Assistant Treasurer, or the president or cashier of a national bank, or, if in a foreign country, before a U. S. minister or consul. In all cases the officer must add his official designation, residence and seal if he has one. When the *assignment* is made by a corporation, it must be named as the assignor; *when by a guardian, trustee, executor, administrator*, an officer of a corporation, *or anyone in a representative capacity*, proof of his authority to act must be produced to the officer before whom *the assignment* is made and must accompany the bond. *Assignors* must be identified as known and responsible persons to the satisfaction of the officer.

One Thousand.

Five per cent Loan of 1904.

One M thousand, 1894. 1904 M·

FIVE PER CENTS OF 1894.

1,000 5 5 1,000

Washington, D. C. February 1, 1894.

M. THE UNITED STATES OF AMERICA

Are indebted to.....*or assigns*, in the sum of One thousand Dollars. This bond is issued under authority of an act of Congress, entitled "An act to provide for the resumption of specie payments," approved January fourteenth, eighteen hundred and seventy-five, being one of the descriptions of bonds described in the act entitled "An act to authorize the refunding of the national debt," approved July fourteenth, eighteen hundred and seventy, as amended by the act of January twentieth, eighteen hundred and seventy-one, and is redeemable at the pleasure of the United States after the first day of February, nineteen hundred and four, in coin of the standard value of the United States on said July fourteenth, eighteen hundred and seventy, with interest in such coin from the day of the date hereof at the rate of five per centum per annum, payable quarterly on the first day of February, May, August and November in each year. *The principal and interest are exempt from the payment of all taxes or duties of the United States, as well as from taxation in any form by or under State, municipal or local authority. Transferable on the books of this office.*

Date of record .....
Entered .....
Recorded .....

.....
Register of the Treasury.

Act of January 14, 1875.

Four per cent. loan of 1925.

Act of January 14, 1875.

WASHINGTON, D. C., February 1, 1895. 1,000

1925. FOUR PER CENTS OF 1895.

1,000. THE UNITED STATES OF AMERICA. No.....

Are indebted to.....*or assigns*, in the sum of One thousand Dollars. This bond is issued under authority of an act of Congress entitled "An act to provide for the resumption of specie payments," approved January fourteenth, eighteen hundred and seventy-five, being one of the descriptions of bonds described in the act entitled "An act to authorize the refunding of the national debt," approved July fourteenth, eighteen hundred and seventy, as amended by the act of January twentieth, eighteen hundred and seventy-one, and is redeemable at the pleasure of the United States after the first day of Feb., nineteen hundred and twenty-five, in coin of the standard value of the United States on said July fourteenth, eighteen hundred and seventy, with interest in such coin from the day of the date hereof at the rate of four per centum per annum, payable quarterly on the first day of February, May, August and November in each year. *The principal and interest are exempt from the payment of all taxes or duties of the United States, as well as from taxation in any form by or under State, municipal or local authority. Transferable on the books of this Office.*

Date of issue.....
Entered .....
Recorded .....

.....
Register of the Treasury.

Form of Bond under Act of 1898.

THREE PER CENT. LOAN OF 1898

1898 1918

THE UNITED STATES OF AMERICA

are indebted unto the *bearer* in the sum of
dollars.

This bond is issued under authority of an Act of Congress entitled "An Act to Provide Ways and Means to Meet War Expenditures," approved June thirteenth eighteen hundred and ninety-eight and is redeemable at the pleasure of the United States after the first day of August, nineteen hundred and eight, and payable August 1, 1918, in coin, with interest at the rate of three per centum per annum, payable quarterly in coin on the first day of November, February, May and August in each year. *The principal and interest are exempt from all taxes or duties of the United States as well as from taxation in any form by or under State, municipal or local authority.*

WASHINGTON, D. C., August 1, 1898.

Entered
Recorded

Act of June 13, 1898.

J. W. LYONS,
Register of the Treasury.